254 N.C. App.—No. 3 Pages 348-612

# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*AUGUST 21, 2019*

**MAILING ADDRESS: The Judicial Department**
**P. O. Box 2170, Raleigh, N. C. 27602-2170**

# THE COURT OF APPEALS
# OF
# NORTH CAROLINA

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MARK DAVIS[13]

[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
[9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016.
[11]Retired 31 December 2018. [12]Retired 31 December 2018. [13]Resigned 24 March 2019.

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[14]Retired 31 August 2018. [15]Began 13 August 2018.

# COURT OF APPEALS

## CASES REPORTED

### FILED 18 JULY 2017



## CASES REPORTED WITHOUT PUBLISHED OPINIONS



## HEADNOTE INDEX

**APPEAL AND ERROR**

**Appeal and Error—preservation of issues—attenuation—burden of proof on other party—appellate rules—intervening event—**The trial court did not commit plain error in a felonious possession of a stolen firearm case by allowing into evidence a stolen and loaded handgun even presuming the State failed to preserve an attenuation issue for review where the burden was on defendant to show error in the lower court's ruling. Alternatively, the Court of Appeals ruled to invoke N.C. R. App. P. 2 to suspend the alleged requirements of N.C. R. App. P. 10 to allow it to consider the State's attenuation argument to prevent manifest injustice. The State presented a sufficient intervening event to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun. **State v. Hester, 506.**

## CONFESSIONS AND INCRIMINATING STATEMENTS

**Confessions and Incriminating Statements—juvenile—totality of circumstances—knowing, willing, and understanding waiver of rights—**The trial court erred by denying defendant juvenile's motion to suppress his statement to an interrogating officer where the totality of circumstances showed he did not knowingly, willingly, and understandingly waive his rights. Defendant, who had difficulty with English, signed a waiver that was in English only, and his unintelligible answers to questions did not show a clear understanding and a voluntary waiver of those rights. **State v. Saldierna, 446.**

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**Confessions and Incriminating Statements—prior custodial statements—exclusion of some but not all—**The trial court did not abuse its discretion in a first-degree murder, attempted murder, and assault with a deadly weapon with intent to kill inflicting serious injury case by excluding two of defendant's prior custodial statements while admitting a third statement into evidence at trial even though defendant maintained the two prior statements should have been admitted under N.C.G.S. § 8C-1, Rule 106 to enhance the jury's understanding of the third. A review of the two prior interview transcripts revealed no statement which, in fairness, should have been considered contemporaneously with the third. **State v. Broyhill, 478.**

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**Constitutional Law—effective assistance of counsel—failure to meet burden of proof—objective standard of reasonableness—deficient performance—**Although defendant's ineffective assistance of counsel claim in a felonious larceny case was premature and should have been initially considered by a motion for appropriate relief to the trial court, the Court of Appeals concluded he did not receive ineffective assistance of counsel where he failed to meet his burden of showing that his attorney's performance fell below an objective standard of reasonableness or that any deficient performance of his attorney prejudiced him. **State v. Bacon, 463.**

**TERMINATION OF PARENTAL RIGHTS**

**Termination of Parental Rights—best interests of child—termination at dispositional stage—**The trial court did not abuse its discretion in a termination of parental rights case by concluding that it was in a minor child's best interests to terminate respondent mother's parental rights at the dispositional stage of the proceeding under N.C.G.S. § 7B-1110(a) even though the mother alleged it would make the child a legal orphan. The child's paternal grandparents and legal custodians raised the child since he was eighteen months old and wished to adopt him, and termination of the mother's parental rights at this stage would facilitate this process. **In re D.E.M., 401.**

**Termination of Parental Rights—grounds for termination—willful abandonment—**The trial court did not err in a termination of parental rights case by adjudicating that grounds existed to terminate respondent mother's parental rights under N.C.G.S. § 7B-1111(a)(7) for willful abandonment where the mother made no effort to contact the child and paid nothing toward his support during the pertinent six months. Further, there was no evidence that the mother sought to stay the order while her appeal was pending pursuant to N.C.G.S. § 7B-1003(a), or otherwise requested visitation with the child from the trial court or petitioner paternal grandparents. **In re D.E.M., 401.**

**WORKERS' COMPENSATION**

**Workers' Compensation—construction injury—independent contractor—**The N.C. Industrial Commission did not err by concluding that plaintiff was not an employee of Piner Construction at the time of his injury on a construction site. Plaintiff's work on the site was characterized by the independence of an independent contractor rather than an employee. **Bentley v. Jonathan Piner Constr., 362.**

**Workers' Compensation—next-of-kin death benefits—time-barred—**The Industrial Commission did not err in a workers' compensation case involving a corrections officer by dismissing plaintiff daughter's claim for next-of-kin death benefits as time-barred where her father was hurt. The relevant statute of limitations refers to an injury that was the cause of death, not a separate injury. **Brown v. N.C. Dep't of Pub. Safety, 374.**

**Workers' Compensation—statutory employment—contract for performance of work—**The Court of Appeals rejected plaintiff's argument that the N.C. Industrial Commission erred by concluding that Piner Construction was not plaintiff's "statutory employer" pursuant to N.C.G.S. § 97-19. Plaintiff failed to produce evidence of any contract for the performance of the work. **Bentley v. Jonathan Piner Constr., 362.**

## SCHEDULE FOR HEARING APPEALS DURING 2019

## NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

ASHEVILLE LAKEVIEW PROPERTIES, LLC, PETER PINHOLSTER, JR., ET AL., PLAINTIFFS
v.
LAKE VIEW PARK COMMISSION, INC., ROBERT H. FARBREY, ET AL., DEFENDANTS

No. COA15-1308

Filed 18 July 2017

**1. Declaratory Judgments—conveyance of trust property—barred by seven-year statute of limitations**

The trial court did not err in a declaratory judgment action by concluding plaintiff lot owners' challenge to a 1996 conveyance of trust property to defendant Commission was barred by the seven-year statute of limitations under N.C.G.S. § 1-38, barring claims for possession of real property against a possessor holding title.

**2. Declaratory Judgments—authority to levy assessments on lot owners—members—articles of incorporation—barred by three-year or six-year statute of limitations**

The trial court did not err in a declaratory judgment action by concluding plaintiff lot owners' challenge to the authority of defendant Commission to levy assessments on the lot owners, and its assertion that all lot owners were members of the Commission and subject to its Articles of Incorporation, were barred by a three-year or six-year statute of limitations. Further, plaintiffs' complaint contained facts showing they authorized the very actions for which they complained.

**3. Declaratory Judgments—constructive trust—violation of express trust—barred by statute of limitations**

The trial court did not err by dismissing plaintiff's claims seeking declaratory relief including a constructive trust where the statute of limitations to bring a claim for violation of an express trust is three years. Further the statute of limitations applicable to constructive trusts is ten years, and the statute runs from the time the tortious or wrongful act is committed. Plaintiffs filed their complaint almost twenty years after the deed was filed and nearly thirty years from the initial assessment rate increase.

**4. Declaratory Judgments—negligent misrepresentation—Unfair and Deceptive Trade Practices Act—money assessments to lot owners—trust property**

The trial court did not err in a declaratory judgment case by dismissing plaintiff lot owners' claims seeking relief on the grounds

of negligent misrepresentation and violation of the Unfair and Deceptive Trade Practices Act regarding the authority of defendant Commission to impose monetary assessments per lot, expend the collected assessments on trust property, develop a southern trail between plaintiffs' respective lots and the lake, and to generally exercise dominion and control over the pertinent trust property.

Judge TYSON dissenting.

Appeal by plaintiffs from orders entered 1 and 17 July 2015 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 9 August 2016.

*Ward and Smith, P.A., by Grant B. Osborne and Alexander C. Dale, for plaintiff-appellants.*

*Deutsch & Gottschalk, P.A., by Tikkun A.S. Gottschalk and Robert J. Deutsch, for defendant-appellees.*

BRYANT, Judge.

Where plaintiffs' underlying claims are barred by statutes of limitations, the Declaratory Judgments Act will not allow relief, and therefore, we affirm the trial court order granting defendants' motion to dismiss pursuant to Rule 12(b)(6).

On 28 May 2015, plaintiffs Asheville Lakeview Properties, LLC; Peter Pinholster, Jr.; Jennifer Pinholster; and John K. Mascari filed a complaint in Buncombe County Superior Court against defendants Lake View Park Commission, Inc. (the Commission); Robert H. Fabrey and Anne Robinson, as the 1996 Commissioners of the Commission (collectively, the "1996 Commissioner defendants"); and Mike Nery, Barbara Hart, Gary Ross, Kevin Saum, and Keith Pandres (all of whom are collectively referenced as the "defendants") seeking an order canceling a 1996 deed, a declaratory judgment against the levy of assessments, a declaratory judgment against compelled membership in the Commission for Lake View Park lot owners, and a declaratory judgment directing that monetary assessments be held in a constructive trust in favor of the lot owners.

*Allegations of Complaint*

The complaint describes Lake View Park as a residential subdivision surrounding a lake (Beaver Lake) in Asheville. The lots which plaintiffs now own were described in a deed filed with the Register of Deeds

in the Buncombe County Registry in 1938. That deed contains express covenants obligating each property owner to pay the Park Commission[1] an assessment for preservation, improvement, and repair of the public areas—sidewalks, parkways, public streets, and driveways—and establishing that the lot owners would annually elect three commissioners to administer the public property and a treasurer to disburse funds as directed. In 1942, a deed was filed conveying Beaver Lake and certain adjacent real property (the "trust property") to the Park Commission and directed that those elected members of the Park Commission and their successors hold the deeded property "in trust to be used for park purposes for the benefit of the owners of lots in the Lake View Park Subdivision." Then, in 1983, articles of incorporation were filed with the North Carolina Secretary of State for the Commission.

> [T]he Commission is formed . . . to enhance and to preserve the beauty and quality of the Lake View Park Subdivision . . . . All areas located in the geographical section of Buncombe County known as Lake View Park . . . shall be deemed the geographical area within which the Commission shall exercise its authority.

Pursuant to the articles of incorporation, the Commission was empowered to "perform all of the duties as set forth in the Lake View Park deeds" as well as "[f]ix, levy and collect property assessments." The articles further provided that " '[a]ll property owners of Lake View Park shall be members' of the [Commission]." In 1996, a deed was filed with the Buncombe County Register by the 1996 Commissioner defendants and three others [E.H. Lederer, John F. Barber, M.D., and John M. Johnston].[2] "The express purpose of the 1996 Deed was 'to transfer all real estate of the previously unincorporated Lake View Park Commission' to [the newly incorporated Commission], which 'real estate' encompasses all of the Trust Property."[3]

Posted on the Commission's website, on 20 October 2014, was a plan to assert possession of the trust property that lies adjacent to plaintiffs' properties to construct a "south trail" to run between plaintiffs' property lots and the lake. In their action for declaratory judgment, plaintiffs alleged the Commission has no authority to levy assessments

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1. The "Park Commission" is the predecessor to "the Commission"—Lake View Park Commission, Inc.—which was formed in 1983.

2. Lederer, Barber, and Johnston are now deceased (and not parties to this action).

3. The trust property consists of Beaver Lake and adjacent property.

against property owners or to build and maintain a trail on the trust property, because the Commission does not hold lawful title to the property. Plaintiffs sought equitable relief in the form of invalidating the 1996 deed.

Plaintiffs allege that neither the 1938 deed nor 1942 deed authorized the Commissioners to convey title of the deeded trust property of Lake View Park, assign the right to collect assessments from Lake View Park lot owners, or to increase the assessments to more than "ten cents per front foot of lot [(as set out in the 1938 deed)]."

On 5 June 2015, the Commission moved to dismiss the complaint pursuant to Rule 12(b)(6) asserting statute of limitations defenses. The Commission asserted its possession of Lake View Park has been "actual, open, hostile, exclusive, and continuous" since at least 1996, if not 1983. In its 12(b)(6) motion to dismiss, the Commission also noted "[p]laintiffs admit that [the Commission] was formed on December 15, 1983, and recite portions of [the Commission's] Articles of Incorporation showing that [the Commission] has 'exercised its authority' over Lake View Park since 1983."

Following a hearing in Buncombe County Superior Court before the Honorable Marvin P. Pope, Jr., Judge presiding, Judge Pope entered an order on 1 July 2015 granting defendants' motion to dismiss "as to every claim for relief set forth in the complaint." Plaintiffs filed a motion for relief pursuant to Rule 60(b)(6), or alternatively, a motion for reconsideration. The motion was denied by order entered 17 July 2015.

Plaintiffs appeal from the orders entered 1 and 17 July 2015, dismissing plaintiffs' claim and denying plaintiffs' Rule 60(b) motion and alternative motion for reconsideration.

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On appeal, plaintiffs' primary argument is that the trial court erred by granting defendants' 12(b)(6) motion to dismiss. We disagree. Plaintiffs challenge the ruling that their complaint was barred by the statute of limitations and further assert the trial court erred by denying plaintiffs' motion for 60(b) relief or alternative motion for reconsideration.

*Analysis*

Plaintiffs argue that the trial court erred by granting defendants' Rule 12(b)(6) motion to dismiss the complaint.

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion, the allegations of the complaint must be viewed as

> admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

*Kohn v. Firsthealth Moore Reg'l Hosp.*, 229 N.C. App. 19, 21, 747 S.E.2d 395, 397 (2013) (quoting *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979)).

> It is well-settled that a plaintiff's claim is properly dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.

*Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013) (citation omitted). This Court reviews a trial court's ruling on a motion for Rule 12(b)(6) de novo. *Id.* "Where a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990).

> The statute of limitations may be raised as a defense by a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the plaintiff's action. It is well-established that once a defendant raises the affirmative defense of the statute of limitations, the burden shifts to the plaintiffs to show their action was filed within the prescribed period.

*Laster v. Francis*, 199 N.C. App. 572, 576, 681 S.E.2d 858, 861 (2009) (citations omitted).

Plaintiffs brought forth five substantive claims, four of which seek equitable relief pursuant to declaratory judgment.

*Declaratory Judgment*

"The purpose of the Declaratory Judgments Act is, to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations . . . . It is to be liberally construed and administered." *York v. Newman*, 2 N.C. App. 484, 489, 163 S.E.2d 282, 286 (1968) (citations omitted). Article 26 ("Declaratory Judgments"), codified within Chapter 1, Subchapter VIII, of our General Statutes, authorizes

> [a]ny person interested as or through an . . . administrator, trustee . . . or cestui que trust, in the administration of a trust . . . may have a declaration of rights or legal relations in respect thereto:
>
> . . . .
>
> (2) To direct the . . . administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity . . . .

N.C. Gen. Stat. § 1-255 (2015). "[A] declaratory judgment should issue (1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006) (quoting *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002) (citing N.C.G.S. § 1–257 (2005))). However, "if the statute of limitations was properly applied to plaintiff's underlying claims, no relief can be afforded under the Declaratory Judgment[s] Act." *Ludlum v. State*, 227 N.C. App. 92, 94, 742 S.E.2d 580, 582 (2013).

Plaintiffs' *first* claim challenges the authority of the grantors of the 1996 deed to convey the Beaver Lake Trust to the Commission. The *second* claim challenges the authority of the Commission to levy assessments on the Lake View Park lot owners and the 1996 deed's assignment of the right to assess a levy to the Commission. Plaintiffs' *third* claim challenges the Commission's assertion (per its Articles of Incorporation) that all Lake View Park owners are members of the Commission and, thus, are subject to its Articles of Incorporation. The *fourth* claim seeks to impose a constructive trust upon the assessments levied upon the Lake View Park lot owners and retained by the Commission.[4]

**[1]** Plaintiffs' first claim challenging the 1996 conveyance of the trust property to the Commission must fail. Taking plaintiffs' claims as true and assuming there is any defect in the title to the trust property, property that the Commission has maintained pursuant to the deed since at least 1996, plaintiffs' claims are barred by the statute of limitations. *See*

4. Plaintiffs' five claims specifically sought (1) equitable cancellation of 1996 Deed of Trust property (action at law for declaratory judgment as to ownership of trust property); (2) declaratory judgment as to assessments; (3) declaratory judgment as to Company membership; (4) declaratory judgment as to establishment of a constructive trust in favor of plaintiffs and lot owners in Lake View Park as to assessments; and (5) negligent misrepresentation by company (a violation of the Unfair and Deceptive Trade Practices Act).

N.C. Gen. Stat. § 1–38 (imposing a seven-year statute of limitations barring claims for possession of real property against a possessor holding title); *see also Perry v. Bassenger*, 219 N.C. 838, 15 S.E.2d 365 (1941).

**[2]** Plaintiffs' second and third claims are each rooted in a challenge to the authority of the Commission to act as the administrative commission for Lake View Park, a function the Commission has performed and Lake View Park lot owners have apparently relied upon since at least 1996.

Per the complaint, the Commission filed articles of incorporation with the Secretary of State in 1983 providing that the Commission was empowered to "[e]xercise all of the powers and privileges and to perform all of the duties as set forth in the Lake View Park deeds with Covenants and Restrictions . . . [as well as] '[f]ix, levy and collect property assessment in accordance of the provisions of the Covenants.' " While plaintiffs assert the Commission acted without authority by increasing the amount of the assessment imposed "per front foot" of each lot from the $0.15 rate established in 1938 to the current rate of $1.20 in 2011, plaintiffs' complaint contains facts showing that plaintiffs authorized the very actions about which they complain. Assuming plaintiffs had asserted an actionable claim, they would nevertheless be barred by a three year or six year statute of limitations.

**[3]** Plaintiffs' fourth claim seeking a constructive trust also implies the existence of an express trust. The complaint sets out that the public property (trust property) of Lake View Park was to be administered by Lake View Park Commissioners, elected by the lot owners of Lake View Park, in trust for the benefit of Lake View Park lot owners.

> A determination of which type of trust plaintiffs have asserted would usually be paramount to the inquiry of whether the statute of limitations barred plaintiffs' action since claims involving express trusts are governed by a three-year statute of limitations, and resulting and constructive trusts are governed by a ten-year statute of limitations. *See* N.C. Gen. Stat. §§ 1-52, -56 (2005). Moreover, where there is an express trust, the statute of limitations does not begin to run until a repudiation or disavowal of the trust occurs, while in instances of a resulting or constructive trust, the statute runs from the time the tortious or wrongful act is committed.

*Laster*, 199 N.C. App. at 576, 681 S.E.2d at 861 (citations omitted). "[O]ur Supreme Court held that '[w]hen a trustee by devise disposes of trust property in fee simple, free from and in contradiction of the terms of

the trust, this is a repudiation or disavowal of the trust.' " *Id.* at 578, 681 S.E.2d at 862 (quoting *Sandlin v. Weaver*, 240 N.C. 703, 709, 83 S.E.2d 806, 810 (1954)). But regardless of the type of trust, plaintiffs' claims in the instant case would be barred.

Taking the allegations of the complaint as true, the Commission repudiated the terms of the Lake View Park trust by transferring the trust corpus to the Commission in 1996. If plaintiffs contend this is a violation of the terms of the trust, the purported transfer of the unencumbered trust corpus would be a repudiation or disavowal of the trust. *Id.* Such an act would commence the running of the applicable statute of limitations beginning in 1996. As the statute of limitations to bring a claim for violation of an express trust is three years, plaintiffs' claim is barred. *Id.* at 576, 681 S.E.2d at 861. Plaintiffs also contend the Commission's conduct entitled them to imposition of a constructive trust (by collecting assessments and periodically increasing the assessment rate). The statute of limitations applicable to constructive trusts is ten years, and "the statute runs from the time the tortious or wrongful act is committed." *Id.* at 576, 681 S.E.2d at 861. Here, plaintiffs filed their complaint on 28 May 2015, almost twenty years after the 1996 deed was filed, the wrongful act of which they complain, and nearly thirty years from the initial assessment rate increase that occurred in 1985. Therefore, the trial court properly dismissed plaintiffs' claims seeking declaratory relief, including a constructive trust.

**[4]** As for plaintiffs' final claim seeking relief on the grounds of negligent misrepresentation and violation of the Unfair and Deceptive Trade Practices Act, plaintiffs again challenge the authority of the Commission to impose monetary assessments per lot, expend the collected assessments on trust property, develop the southern trail between plaintiffs' respective lots and Beaver Lake, and generally exercise dominion and control over the trust property—administrative duties in which the Commission has been engaged since at least 1996.

"The statute of limitations applicable to negligent misrepresentation claims is three years. *See* N.C. Gen. Stat. § 1-52(5)[.]" *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 35, 681 S.E.2d 465, 470 (2009) (citation omitted). A four-year statute of limitations is applied to claims for unfair and deceptive trade practices. *See Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 251, 628 S.E.2d 427, 430 (2006) (reasoning "the UDTP claim [was] . . . governed by the four-year statute of limitations"). Therefore, given the time frames at issue here, the trial court properly dismissed plaintiffs' claims for negligent misrepresentation and unfair and deceptive trade practices. Accordingly, we affirm the trial court's

order granting defendants Rule 12(b)(6) motion to dismiss all claims in plaintiffs' complaint.[5]

Having affirmed the trial court order dismissing plaintiffs' complaint, and for the reasons stated herein as to why we affirmed the trial court order, we likewise affirm the trial court order denying plaintiffs' Rule 60(b) motion or alternative motion for reconsideration.

AFFIRMED.

Judge INMAN concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The record clearly indicates the trial court's consideration of matters outside the face of the complaint converted Defendants' Rule 12(b)(6) motion to dismiss to a motion for summary judgment, and that Plaintiffs were not afforded a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C. Gen. Stat. § 1A-1, Rule 12(b) (2015). I vote to reverse the trial court's order and remand and respectfully dissent.

## I. Relevant Facts

On 28 May 2015, Plaintiffs filed their complaint in Buncombe County Superior Court. Approximately a week later, on 5 June 2015, Defendants filed a Rule 12(b)(6) motion to dismiss, which asserted Plaintiffs' claims were barred by the statute of limitations. On 9 June 2015, Plaintiffs filed a motion for preliminary injunction to enjoin Defendants from "trespassing on Plaintiffs' properties, from removing or tampering with certain fences . . . , and from proceeding with construction of a walking trail[.]"

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5. The dissent takes the position that the trial court's ruling should have been converted to one for summary judgment, and cites to notes taken by the trial court at the Rule 12(b)(6) hearing as proof the trial court considered matters outside the pleadings. However, where the order dismissing all claims was based on the fact that all claims were barred by statutes of limitations, the complaint on its face discloses facts that defeat all claims. Thus, the position taken by the dissent is to no avail. On this record, notwithstanding "notes" made by the trial court, the clear basis for the trial court's ruling was the failure of the complaint to "state" a claim where all claims were barred by statutes of limitations. *See Page*, 177 N.C. App. at 248, 628 S.E.2d at 428 ("On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court conduct[s] a de novo review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." (alteration in original) (citation omitted)).

On 24 June 2015, Defendants served Plaintiffs with a memorandum of law in support of Defendants' motion to dismiss and in opposition to Plaintiffs' motion for a preliminary injunction. Defendants' memorandum included several attached affidavits and exhibits. In response, Plaintiffs submitted a memorandum of law in opposition to Defendants' Rule 12(b)(6) motion to dismiss. Plaintiffs' memorandum specifically states the trial court's standard under Rule 12(b)(6) and asserted Defendants' arguments were not supported by a review limited to the face of the complaint.

Plaintiffs also served Defendants with a written objection to consideration of evidence on Defendants' Rule 12(b)(6) motion to dismiss on 26 June 2015 and formally filed the motion on 1 July 2015. Plaintiffs asserted the affidavits and exhibits submitted in support of Defendants' motion to dismiss constituted matters outside the face of the complaint and should be disregarded by the court in its consideration of Defendants' Rule 12(b)(6) motion.

Plaintiffs further specifically: (1) noted they had not submitted any additional evidence in response to Defendants' motion; (2) objected to the trial court's consideration of the evidence presented by Defendants; and (3) objected to the conversion of Defendants' motion to dismiss into a motion for summary judgment.

The trial court considered Defendants' Rule 12(b)(6) motion to dismiss at a hearing on 29 June 2015. At the hearing, Plaintiffs consistently reiterated, under Rule 12(b)(6), the court was to look solely at the legal sufficiency of the complaint and stated, "[a] lot of what we have heard already will be very appropriate for consideration under summary judgment when that day comes. This is not that day." After hearing the arguments, the trial court orally granted Defendants' Rule 12(b)(6) motion to dismiss and a written order was entered on 1 July 2015.

Prior to signing and entering the order on 1 July 2015, the trial judge met with the parties' counsel in his chambers to discuss the form and content of the order of dismissal. Both parties acknowledge this meeting occurred and at some point the judge shared a copy of his notes upon which he based his decision ("Rule 12(b)(6) Memo"). The Rule 12(b)(6) Memo is included in the record on appeal and begins by stating: "Basis for Rule 12(b)(6) ruling on June 29, 2015; *taking the allegations in the Complaint in light most favorable to the moving party*[.] (emphasis supplied). The Rule 12(b)(6) Memo then outlines the judge's understanding of some of the basic facts of the case, including information and facts not alleged in the complaint.

On 10 July 2015, Plaintiffs filed a motion for relief from the trial court's order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(6), and, in the alternative, a motion for reconsideration. Plaintiffs again asserted the trial court had improperly considered matters outside the face of the complaint and that Defendants' motion to dismiss should have been denied under the proper standard of review applicable to Rule 12(b)(6). The trial court denied Plaintiffs' motion on 17 July 2015. Plaintiff appeals.

II. Rule 12(b)(6) Standard of Review

"A motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar plaintiff's claims *if the bar is disclosed in the complaint.*" *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (emphasis supplied) (citing *Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996)).

"A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (citation and quotation marks omitted). "When considering a 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Carlisle*, 169 N.C. App. at 681, 614 S.E.2d at 547 (citation and quotation marks omitted).

"On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation and internal quotation marks omitted), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009). This Court "consider[s] the allegations in the complaint true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.*

However, Rule 12(b) further provides:

> If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

N.C. Gen. Stat. § 1A-1, Rule 12(b) (emphasis supplied); *see Snyder v. Freeman*, 300 N.C. 204, 208, 266 S.E.2d 593, 596 (1980) (agreeing the trial court's "dismissal on the ground of the statute of limitations was, in effect, the entry of summary judgment inasmuch as matters outside the pleadings must have been considered by [the court]"); *Williams v. Advanced Auto Parts, Inc.*, ___ N.C. App. ___, ___, 795 S.E.2d 647, 651 ("[A] Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court."), *disc. review denied*, __ N.C. __, 799 S.E.2d 45 (2017).

"[T]he trial court [is] not required to convert a motion to dismiss into one for summary judgment simply because additional documents [are] submitted[.]" *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 252, 552 S.E.2d 186, 189 (2001), *disc. review denied*, 356 N.C. 438, 572 S.E.2d 788 (2002); *see Privette v. University of North Carolina*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989). Where the record clearly indicates the trial court did not consider the additional documents, this Court reviews the trial court's decision under Rule 12(b)(6). *Pinney*, 146 N.C. App. at 252, 552 S.E.2d at 189.

On the other hand, as here, where the record clearly demonstrates the trial court considered and did not exclude the additional documents, the Rule 12(b)(6) motion is converted to a motion for summary judgment and the opposing party must be "afforded a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Kemp*, 166 N.C. App. at 462, 602 S.E.2d at 690 (citation and internal quotation marks omitted). If the parties are not afforded such an opportunity, this Court remands the case "so as to allow the parties full opportunity for discovery and presentation of all pertinent evidence." *Id.*

III. Rule 56 Summary Judgment Standard of Review

This Court reviews an order granting summary judgment *de novo* and views the evidence in the light most favorable to the nonmoving party. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008); *Williams v. Habul*, 219 N.C. App. 281, 289, 724 S.E.2d 104, 109 (2012). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015); *see Draughon v. Harnett Cty. Bd. Of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

## IV. Analysis

While the trial court is not required to convert a Rule 12(b)(6) motion to a summary judgment motion based solely on the submission of additional documents, *Pinney*, 146 N.C. App. at 252, 552 S.E.2d at 189, where the trial court considered and did not exclude such documents "the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b) (emphasis supplied). The record before us demonstrates the trial court clearly considered matters outside the complaint, and apparently in the light most favorable to the moving party, prior to granting Defendants' motion to dismiss.

The trial judge's Rule 12(b)(6) Memo clearly states the information contained therein was the basis upon which the trial court granted the motion to dismiss. This memo includes facts and information not found within the four corners of the complaint. Specifically, the trial judge's notes 6(b) through 6(h) pertain to fences on Plaintiffs' properties. This issue was raised primarily in Plaintiffs' motion for preliminary injunction and in the Affidavit of Billy Jenkins filed in support of Defendants' motion to dismiss, and not in Plaintiffs' complaint.

The trial judge's Rule 12(b)(6) Memo also suggests the court applied the inappropriate standard of review. The Rule 12(b)(6) Memo states the court took "the allegations in the Complaint in light *most favorable to the moving party*[.]" (emphasis supplied). When reviewing a motion under Rule 12(b)(6), the trial court looks only at the allegations in the complaint and takes them as true. *Christmas*, 192 N.C. App. at 231, 664 S.E.2d at 652. Under summary judgment, the trial court must review the evidence in the light most favorable to the *nonmoving party*, here the Plaintiff. *See Williams*, 219 N.C. App. at 289, 724 S.E.2d at 109.

Even in absence of trial judge's Rule 12(b)(6) Memo, and unlike in *Pinney* and *Privette*, the record does not clearly indicate that the trial court specifically excluded the additional affidavits and exhibits Defendants presented in support of their Rule 12(b)(6) motion to dismiss, or that the trial court refused to consider those documents when granting the motion pursuant to Rule 12(b)(6). *See Pinney*, 146 N.C. App. at 252, 552 S.E.2d at 189; *Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189.

Based upon the trial court's consideration of matters outside the face and four corners of the complaint, Defendants' Rule 12(b)(6) motion was converted to a motion for summary judgment under Rule 56. *See Kemp*, 166 N.C. App. at 462, 602 S.E.2d at 690. Upon conversion

of the motion as one for summary judgment, the statute required that all parties "be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C. Gen. Stat. § 1A-1, Rule 12(b).

Throughout the proceedings, Plaintiffs correctly and consistently argued and emphasized that Rule 12(b)(6) requires the trial court to look solely at the allegations in the complaint. Plaintiffs further noted they had not presented any additional evidence, which would be allowed if the court were proceeding under a summary judgment standard. Plaintiffs clearly objected to the consideration of such evidence, exhibits, and affidavits presented by Defendants. Based upon the record before us, Plaintiffs were not allowed the required "reasonable opportunity" to present material pertinent to summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b).

## V. Conclusion

The trial court improperly considered matters and evidence outside the face of the complaint and failed to provide Plaintiffs with the statute's mandatory reasonable opportunity to present evidence pertinent to a motion for summary judgment. *See id.*

I respectfully dissent from the majority's analysis and ruling to affirm under Rule 12(b)(6) and vote to reverse and remand to allow both parties full opportunity for discovery and presentation of all pertinent evidence under Rule 56. *See id*; N.C. Gen. Stat. § 1A-1, Rule 56.

THOMAS BENTLEY, EMPLOYEE, PLAINTIFF
v.
JONATHAN PINER CONSTRUCTION, ALLEGED EMPLOYER, AND STONEWOOD INSURANCE COMPANY, ALLEGED CARRIER, DEFENDANTS

No. COA16-62-2

Filed 18 July 2017

**1. Appeal and Error—workers' compensation—failure to raise issue before Industrial Commission—waiver**

Plaintiff waived his argument that the N.C. Industrial Commission erred by basing its opinion and award on an opinion and order by a deputy commissioner who was not present at his hearing and did not hear the evidence. Plaintiff failed to raise the issue before the Commission and could not raise it for the first time before the Court of Appeals.

**2. Workers' Compensation—construction injury—independent contractor**

The N.C. Industrial Commission did not err by concluding that plaintiff was not an employee of Piner Construction at the time of his injury on a construction site. Plaintiff's work on the site was characterized by the independence of an independent contractor rather than an employee.

**3. Workers' Compensation—statutory employment—contract for performance of work**

The Court of Appeals rejected plaintiff's argument that the N.C. Industrial Commission erred by concluding that Piner Construction was not plaintiff's "statutory employer" pursuant to N.C.G.S. § 97-19. Plaintiff failed to produce evidence of any contract for the performance of the work.

Appeal by Plaintiff from opinion and award of the North Carolina Industrial Commission entered 9 October 2015. Originally heard in the Court of Appeals 8 August 2016, with an opinion filed 20 September 2016 vacating the Industrial Commission's opinion and award and remanding the case for a new hearing. Defendants' petition for rehearing was granted 17 November 2016. Reheard in the Court of Appeals 6 February 2017. This opinion supersedes and replaces the opinion filed 20 September 2016.

*Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III; and Dodge Jones Law Firm, P.A., by Robert C. Dodge, for Plaintiff-Appellant.*

*Dickie, McCamey & Chilcote, P.C., by Michael W. Ballance and Martin R. Jernigan, for Defendants-Appellees.*

*Smith Moore Leatherwood LLP, by Jeri L. Whitfield, for North Carolina Association of Defense Attorneys, amicus curiae.*

*Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner; and Law Office of David P. Stewart, by David P. Stewart, for Workers' Injury Law & Advocacy Group, amicus curiae.*

McGEE, Chief Judge.

Thomas Bentley ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") determining he was not an "employee" of Jonathan Piner Construction ("Piner Construction"), as that term is used in the North Carolina Workers' Compensation Act, N.C. Gen. Stat. § 97-1 *et seq.* In an opinion published 20 September 2016, this Court determined that the plain language of N.C. Gen. Stat. § 97-84 (2015) was violated when the Commission based its opinion and award on an opinion and order by a deputy commissioner who was not present at the hearing and did not hear the evidence. *Bentley v. Piner*, ___ N.C. App. ___, ___, 790 S.E.2d 379, 382 (2016). Defendants petitioned this Court for rehearing, which we granted. Upon rehearing, we hold that Plaintiff did not preserve his argument regarding the proper interpretation of N.C.G.S. § 97-84 due to his failure to raise it before the Commission. We further hold that the Commission did not err in concluding Plaintiff was not an employee of Piner Construction, nor did it err in holding that Piner Construction was not Plaintiff's "statutory employer" pursuant to N.C. Gen. Stat. § 97-19. Accordingly, we affirm the order of the Commission.

## I. Background

In early 2014, Plaintiff and his friend, George Tucker ("Tucker"), were working "side jobs" in the construction industry in and around Newport, North Carolina. At the time, Plaintiff held himself out as the owner and operator of Bentley Construction and Maintenance ("Bentley Construction") and had distributed business cards that advertised his business services as "[r]oofing, siding, painting, pressure washing . . .

[r]emodels and renovations, [and] sheetrock work and repairs." Plaintiff also operated a website under the Bentley Construction name.

One day in February 2014, Plaintiff and Tucker were driving around in Plaintiff's truck, which had the words "Bentley Construction and Maintenance" displayed in a decal on its side, looking for work. While driving about, Plaintiff and Tucker happened upon a jobsite in the Breakwater subdivision in Newport, North Carolina (the "Breakwater jobsite").[1] Plaintiff pulled his truck over and attempted to find the person in charge to ask if he and Tucker could work on the Breakwater jobsite. Plaintiff and Tucker encountered Jonathan Piner ("Piner"), the owner and operator of Piner Construction.

Piner Construction was the subcontractor responsible for, *inter alia*, the framing of the houses being constructed at the Breakwater jobsite. After talking for a brief period of time about what type of experience Plaintiff and Tucker had in the construction industry, Plaintiff handed Piner a Bentley Construction business card and asked Piner to call if he had any framing work available. Piner responded that if "some work [came] up . . . that [he] couldn't put [his] guys on," he would call Plaintiff.

A few weeks later, Piner "felt like [he] might need to make a phone call to somebody" to assist on the framing job at the Breakwater jobsite because he believed Piner Construction would not be able to complete all of the framing work. Piner contacted Plaintiff, and gave him the option of being paid at a fixed price or being paid by the hour. Plaintiff replied that he would "get back" to Piner on his preferred method of payment. After hearing from Piner, Plaintiff contacted, among others, Tucker and Shawn Noling ("Noling") to request their assistance on the Breakwater jobsite.

When Plaintiff, Tucker, and Noling arrived at the Breakwater jobsite to begin work, Piner produced the blueprints for the house to be constructed. Noling introduced himself to Piner, read the blueprints,[2] and then suggested the hourly rate that each man should be paid: Noling was paid $18.00 per hour, Tucker was paid $14.00 per hour, and Plaintiff was paid $12.00 per hour. Piner characterized Noling as the

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1. We note that there is some discrepancy in the record about the location and name of the jobsite at issue. Tucker identified the jobsite as the "Phillips Landing subdivision" in Morehead City, North Carolina, while Piner identified the jobsite as the "Breakwater subdivision" in Newport, North Carolina. To avoid confusion and for ease of reading, we will simply refer to the jobsite as the "Breakwater jobsite."

2. At the hearing, Noling agreed that he "read the blueprints as a member of [the Bentley Construction] crew."

"lead man" and the "man running the show" due to his expertise and experience in the construction industry, and characterized Plaintiff as the "low man on the totem pole" due to his relative inexperience. Piner asked Plaintiff if he wanted a single check written to him for all of the men he had brought with him to work on the Breakwater jobsite "because [Plaintiff] was operating as [Bentley Construction]." Plaintiff requested that Piner pay each man individually, and Piner agreed to do so.

Tucker testified that he, Plaintiff, and Noling were able to set their own hours, including making decisions about when breaks were to be taken. At the Breakwater jobsite, Plaintiff brought and used his own tools, including a compressor, a nail gun, and a "sawzall." As the work progressed, Plaintiff, Tucker, and Noling were "struggling for tools" because the tools brought by Plaintiff were inadequate, so Piner brought tools from them to use. When Noling realized another worker was needed to complete the job, he enlisted the help of C.P. Hollingsworth ("Hollingsworth"). Noling testified that he did not need to ask Piner's permission to hire Hollingsworth, and that Plaintiff similarly could have hired another person to work on the Breakwater jobsite without consulting Piner. Noling also testified that Piner did not instruct him to frame the house in a specific manner, and that he, Plaintiff, Tucker, and Hollingsworth used their own special skills, knowledge, and training to frame the house. According to Noling, Piner was not interested in the method employed to frame the house, but was only interested in "[t]he finished product."

Plaintiff worked as a "cut man" on the Breakwater jobsite. While working on 3 March 2014, Plaintiff was injured when a nail he was prying from a board broke loose and struck him in the right eye. As we explained in our previous opinion in this case,

> [f]ollowing the injury, Plaintiff filed a workers' compensation claim with the Commission on 25 March 2014. Piner Construction, along with its insurance carrier, Stonewood Insurance Company (collectively, "Defendants") denied the claim for compensation, contending the injury was non-compensable under the Workers' Compensation Act because Plaintiff was not an employee of Piner Construction on the date of the accident. The claim was assigned for a hearing before Deputy Commissioner Mary C. Vilas ("Deputy Vilas").

*Bentley*, ___ N.C. App. at ___, 790 S.E.2d at 379. A hearing was held before Deputy Vilas on 5 December 2014. At the hearing, Tucker, Noling,

and Piner testified. Plaintiff was not present for, and did not testify at, the hearing.

> Near the end of the [5 December 2014] hearing, Deputy Vilas suggested that the jurisdictional question of whether Plaintiff was an employee of Piner Construction be bifurcated from the merits of Plaintiff's claim, because she would no longer be at the Commission after 1 February 2015. Deputy Vilas noted that she had many cases to write, but she would "try" to decide the jurisdictional question in the present case before she left the Commission. An order bifurcating the jurisdictional and merits issues was filed 9 December 2014 by Deputy Vilas, and stated that bifurcation "was appropriate given the issues for hearing and that medical testimony by deposition is not scheduled until 26 January 2015 and [Deputy Vilas] will not be at the Commission after 1 February 2015." Deputy Vilas filed an order closing the record and declaring that the jurisdictional issue was "ready for a decision" on 12 January 2015.
>
> An opinion and order was entered 16 February 2015 by Deputy Commissioner William H. Shipley ("Deputy Shipley"). Deputy Shipley concluded as a matter of law that the Commission lacked jurisdiction over Plaintiff's claim because he was not an employee of Piner Construction at the time his injury was sustained.

*Id.* at ___, 790 S.E.2d at 379-80. Plaintiff filed a notice of appeal to the Commission from Deputy Shipley's order. The Commission acknowledged Plaintiff's notice of appeal, and provided Plaintiff with a Form 44. Plaintiff returned the Form 44, which listed the ways in which Plaintiff believed Deputy Shipley had erred in his opinion and order. The Commission issued an opinion an award on 9 October 2015 concluding as a matter of law that: (1) the Commission lacked jurisdiction over Plaintiff's claim because he was not an employee of Piner Construction at the time his injury was sustained; and (2) Piner Construction was not Plaintiff's "statutory employer" pursuant to N.C.G.S. § 97-19. Plaintiff appeals.

## II. Analysis

Plaintiff has raised three issues in his appeal to this Court. Plaintiff argues the Commission erred by: (1) basing its opinion and award on an opinion and order by a deputy commissioner who was not present at the hearing and did not hear the evidence; (2) failing to find and conclude that Plaintiff was an employee of Piner Construction at the

time of Plaintiff's injury; and (3) failing to find and conclude that Piner Construction should be held liable as a statutory employer pursuant to N.C.G.S. § 97-19.

A. Waiver of N.C. Gen. Stat. § 97-84 Argument

**[1]** We must first consider whether Plaintiff's argument regarding the proper interpretation of N.C.G.S. § 97-84 has been preserved for appellate review. Plaintiff has raised his statutory interpretation argument for the first time in this Court. Whether N.C.G.S. § 97-84 permits a deputy commissioner to issue an opinion and award in a case over which the deputy commissioner did not personally preside was not raised in the evidentiary hearing before Deputy Vilas, was not mentioned nor decided in the opinion and award filed by Deputy Shipley, and was not an issue included in Plaintiff's application for review to the Commission. Generally, a party may not raise an issue on appeal if that argument was not first raised in the trial court. N.C.R. App. P. 10(a)(1). Precedents of this Court hold that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotations omitted); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].").

This prohibition against raising new arguments on appeal not presented to the trial court in the first instance has been applied by this Court to cases arising from the Industrial Commission. *Floyd v. Exec. Personnel Group*, 194 N.C. App. 322, 329, 669 S.E.2d 822, 828 (2008). When a party appeals a deputy commissioner's opinion and award to the Commission within the time permitted, "the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]" N.C. Gen. Stat. § 97-85 (2015). After receiving a notice of appeal, the Commission supplies the appellant with a Form 44 Application for Review, in which the appellant must "stat[e] the grounds for its appeal 'with particularity.' The appellant must then file and serve the completed Form 44 and an accompanying brief within the specified time limitations 'unless the Industrial Commission, in its discretion, waives the use of the Form 44.' " *Cooper v. BHT Enters.*, 195 N.C. App. 363, 368, 672 S.E.2d 748, 753 (2009) (citations omitted); *see also* 04 NCAC 10A .0701(d) (2015).

In the present case, Plaintiff sent a letter and notice of appeal from Deputy Shipley's opinion and order to the Commission. After receiving

an acknowledgment of his appeal, Plaintiff filed a Form 44, along with a brief, neither of which raised the issue of whether a deputy commissioner may issue an opinion and award when he or she was not present at the hearing and did not hear the evidence. We hold that Plaintiff's failure to raise this issue before the Commission bars his ability to raise it in this Court in the first instance. Therefore, we deem this argument waived.

B. Employee/Employer Relationship

**[2]** Plaintiff argues the Commission erred by concluding that Plaintiff was not an employee of Piner Construction at the time of the accident. We disagree. In order to maintain a proceeding for workers' compensation, "the claimant must have been an employee of the party from whom compensation is claimed." *McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001) (citation omitted). "[T]he existence of an employer-employee relationship at the time of the injury constitutes a jurisdictional fact." *Id.* As our Supreme Court has held,

> the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

*Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976). In *Hayes v. Elon College*, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944), our Supreme Court set forth an eight-factor test to guide courts in determining when a plaintiff is an independent contractor:

> The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

*Hayes*, 224 N.C. at 16, 29 S.E.2d at 140 (citations omitted). Not all factors are required, and no one factor is controlling over another; the *Hayes* factors "are considered along with all other circumstances to determine

whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee." *Id.* "The claimant has the burden of proof that the employer-employee relation existed at the time the injury by accident occurred." *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261.

Applying the *Hayes* factors to the present case, and considering "all other circumstances" relevant, we hold the Commission correctly determined that Plaintiff was an independent contractor, not an employee, of Piner Construction at the time of his injury. First, Plaintiff was engaged in the independent calling of being a "cut man" in the framing process, and held himself out as the owner and operator of Bentley Construction. There was evidence presented at the hearing that Bentley Construction was more an aspiration than an actual business – Tucker testified that the business was "a dream" and "a joke" and Noling similarly testified that it was fair to characterize Bentley Construction as "a dream." Plaintiff nevertheless distributed a Bentley Construction business card to Piner, held himself out to Piner as the owner and operator of Bentley Construction, and placed a Bentley Construction decal on his truck. Further, Noling testified that when he arrived at the Breakwater jobsite, he considered himself a part of the Bentley Construction "crew." Considering the evidence presented, we find that Plaintiff was engaged in an independent business, calling, or occupation.

Second, there is no direct evidence regarding whether Plaintiff himself had the independent use of his special skill, knowledge, or training in the execution of the work done at the Breakwater jobsite, as Plaintiff did not testify at the hearing. However, testimony from Noling and Tucker suggests that he did, indeed, have the independent use of his special skill, knowledge, or training in the execution of the work done at the Breakwater jobsite. Noling testified Piner did not instruct him on how to frame the house that was being constructed and that he, as a member of Bentley Construction, used his own special skills, knowledge, and training to frame the house. Tucker similarly testified that no one told him how to frame the house that he, Noling, Hollingsworth, and Plaintiff were helping to construct. This evidence suggests that Plaintiff, like Noling and Tucker, had the independent use of his special skill, knowledge or training. At a minimum, Plaintiff has failed to meet his burden of proof as to this factor. *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261.

Third, Piner Construction paid Plaintiff at an hourly rate of $12.00. Although being paid an hourly rate is more suggestive of an employee, it is not determinative. *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140; *see also Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384-85, 364

S.E.2d 433, 438 (1988). We also note that Piner gave Plaintiff the option of being paid a lump sum, and asked Plaintiff whether he would like to be paid a single check for all of the men he had brought with him "because he was operating as [Bentley Construction]." Plaintiff refused both offers.

Fourth, the evidence presented at the hearing suggested Plaintiff was not subject to discharge because he adopted one method of completing the work rather than another. Noling testified that Piner never instructed him on the method in which to frame the house, and that Piner's only concern was that the finished product correlate with the blueprints and change orders. Piner similarly testified that he was unconcerned with how the house was framed, so long as the finished project was completed consistent with the specifications provided by the general contractor.

Fifth, the evidence suggested that Plaintiff was not in the "regular employ" of Piner Construction. Tucker testified that, prior to the work on the Breakwater jobsite, he had never done any work for Piner Construction, and Piner testified he had never met or worked with Plaintiff prior to Plaintiff approaching him in February 2014 and Plaintiff's subsequent work on the Breakwater jobsite.

Sixth, the evidence suggested that Plaintiff was free to use such assistants as he thought was proper. After Piner called Plaintiff to ask him to work on the Breakwater jobsite, Plaintiff contacted Noling and Tucker to enlist their help on the project. Noling also testified that, after he realized another person would be needed to work on the Breakwater jobsite, he was able to hire Hollingsworth without Piner's permission, and that Plaintiff similarly could have hired an additional person to work on the Breakwater jobsite without consulting Piner. Piner echoed this sentiment, testifying that Plaintiff could have hired workers and added them to the Piner Construction payroll "without any communication" with him.

Seventh, the evidence suggested that Plaintiff did not have full control over the assistants he arranged to work with him on the Breakwater jobsite. However, the power to control the assistants was not wielded by Piner or anyone from Piner Construction, but rather by Noling, the "lead man" who was himself contacted by Plaintiff to work on the Breakwater jobsite. Although Plaintiff did not have complete control over his assistants, neither did Piner or anyone from Piner Construction. On balance, this evidence does not factor into the consideration of whether Plaintiff was an employee or independent contractor.

Finally, the evidence suggested that Plaintiff, Tucker, Noling, and Hollingsworth collectively selected their own time. Tucker testified he was able to make his own hours, and Noling similarly testified that no one instructed him on when to begin and finish work for the day or when to take a lunch break. Piner confirmed this testimony, stating that he did not control the time when Plaintiff, Tucker, Noling, and Hollingsworth worked.

In considering all these factors along with the entire record in this case, we hold that Plaintiff has not satisfied his burden of demonstrating that he was an employee of Piner Construction at the time of his injury. Applying the *Hayes* factors, we conclude that Plaintiff was an independent contractor not subject to the provisions of the Workers' Compensation Act. Due to Plaintiff's status as an independent contractor, the Commission did not err in determining that it lacked jurisdiction over the present case.

C. Statutory Employer

**[3]** In his final argument, Plaintiff contends the Commission erred in concluding Piner Construction was not Plaintiff's "statutory employer." Specifically, Plaintiff contends "if anyone subcontracted the [Breakwater] framing job from Piner Construction, it was [Noling]. As such, [Piner Construction] would be liable for [Plaintiff's] injuries" pursuant to N.C.G.S. § 97-19 unless Piner Construction obtained proof of Noling's workers' compensation insurance. We disagree and find N.C.G.S. § 97-19 inapplicable to the present case.

N.C.G.S. § 97-19, as relevant to Plaintiff's argument, provides:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without obtaining from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 for a specified term, shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.

N.C. Gen. Stat. § 97-19 (2015). The "manifest purpose" of N.C.G.S. § 97-19 "is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on principal contractors, intermediate contractors, or subcontractors, who . . . have it within their power, in choosing subcontractors, to pass upon their financial responsibility and insist upon appropriate compensation protection for their workers." *Greene v. Spivey*, 236 N.C. 435, 443, 73 S.E.2d 488, 494 (1952). N.C.G.S. § 97-19 "applies only when two conditions are met. First, the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor. Second, the subcontractor does not have workers' compensation insurance coverage covering the injured employee." *Spivey v. Wright's Roofing*, 225 N.C. App. 106, 118, 737 S.E.2d 745, 753 (2013).

As this Court has held, "[N.C.]G.S. § 97-19, by its own terms, cannot apply unless there is first a contract for the performance of work which is then sublet." *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 310, 392 S.E.2d 758, 760 (1990). In the present case, Plaintiff provided no evidence of the contract between the owner of the Breakwater jobsite and the principal contractor, the subcontract between the principal contractor and Piner Construction, or any subcontract between Piner Construction and Noling.

However, even if Plaintiff is correct that Piner Construction had subcontracted the framing job to Noling – as noted above, a contention with little support in the record – Plaintiff has not shown that he was an employee of Noling. No evidence was presented at the hearing that tended to establish an employer-employee relationship between Noling and Plaintiff. To the contrary, the evidence showed that Plaintiff himself solicited and received the framing job from Piner under the Bentley Construction name and, thereafter, contacted Noling to work on the Breakwater jobsite with him. While Noling testified he was the "lead man" on the project, no evidence tended to show that Noling was Plaintiff's employer. As we have held, applying the *Hayes* factors, Defendant was an independent contractor of Piner Construction while working at the Breakwater jobsite.

Even if we were to assume that Piner Construction subcontracted the framing project to Noling, and were to further assume some type of relationship between Plaintiff and Noling, Plaintiff would at most be an independent contractor of Noling, not one of his employees. North Carolina's statutory employer statute only applies to injured subcontractors and their employees, not independent contractors of a subcontractor, placing Plaintiff outside the protections afforded by N.C.G.S. § 97-19.

*See Greene v. Spivey*, 236 N.C. 435, 444, 73 S.E.2d 488, 494 (1952) (holding N.C.G.S. § 97-19 "is not applicable to an independent contractor").

Plaintiff directs this Court to *Davis v. Taylor-Wilkes Helicopter Servs.*, 145 N.C. App. 1, 549 S.E.2d 580 (2001) in support of his contention that Piner Construction was his statutory employer pursuant to N.C.G.S. § 97-19. In *Davis*, the plaintiff, Carlton Davis ("Davis") worked as an independent contractor for the defendant, Taylor-Wilkes Helicopter Service, Inc. ("Taylor-Wilkes"). 145 N.C. App. at 2-3, 549 S.E.2d at 581. Davis was injured in the course of his work for Taylor-Wilkes when a "highboy sprayer" he was operating tipped over. *Id.* at 3; 549 S.E.2d at 581. Davis pursued a claim for workers' compensation, and this Court found Taylor-Wilkes to be Davis' statutory employer. After examining the language of N.C.G.S. § 97-19, this Court concluded that, because there was "no evidence that Taylor-Wilkes obtained the necessary certificate" certifying Davis was covered by workers' compensation insurance, "under N.C. Gen. Stat. § 97-19, Taylor-Wilkes remained liable for [Davis'] compensable injuries while he was working under a subcontract from Taylor-Wilkes." *Id.* at 10, 549 S.E.2d at 585.

In the present case, and unlike in *Davis*, Plaintiff does not argue he was a subcontractor of Piner Construction, but instead argues Noling was a subcontractor of Piner Construction, and that Plaintiff was an employee of Noling. As discussed above, Plaintiff did not produce evidence to show either that Noling was Piner Construction's subcontractor, or that Plaintiff was an employee of Noling. The evidence instead tended to suggest that Plaintiff, Noling, and Tucker were each independent contractors of Piner Construction. We therefore find Davis inapposite to the present case, and hold that Piner Construction was not Plaintiff's statutory employer pursuant to N.C.G.S. § 97-19.

## III. Conclusion

Plaintiff did not preserve his argument regarding whether N.C.G.S. § 97-84 permits a deputy commissioner to issue an opinion and award in a case in which the deputy commissioner did not hear the evidence due to his failure to raise it before the Commission. The Commission did not err in holding Plaintiff to be an independent contractor, nor did it err in finding that Piner Construction was not Plaintiff's statutory employer pursuant to N.C.G.S. § 97-19. Accordingly, we affirm the judgment of the Industrial Commission.

AFFIRMED.

Judges CALABRIA and STROUD concur.

ANGELA BROWN, Next of Kin of DONALD L. BROWN, Deceased Employee, Plaintiff
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, Employer, SELF-INSURED (CORVEL CORPORATION, Third-Party Administrator), Defendant

No. COA16-740

Filed 18 July 2017

**Workers' Compensation—next-of-kin death benefits—time-barred**

The Industrial Commission did not err in a workers' compensation case involving a corrections officer by dismissing plaintiff daughter's claim for next-of-kin death benefits as time-barred where her father was hurt. The relevant statute of limitations refers to an injury that was the cause of death, not a separate injury.

Appeal by Plaintiff from opinion and award of the North Carolina Industrial Commission entered 22 April 2016. Heard in the Court of Appeals 20 February 2017.

*Campbell & Associates, by Bradley H. Smith, for Plaintiff-Appellant.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Ryan C. Zellar, for Defendant-Appellee.*

McGEE, Chief Judge.

Angela Brown ("Plaintiff") appeals from opinion and award of the North Carolina Industrial Commission ("the Commission") dismissing Plaintiff's claim for next-of-kin death benefits under the North Carolina Workers' Compensation Act. We affirm.

## I. *Background*

Plaintiff's father, Donald L. Brown (hereinafter, "Brown" or "Decedent"), was employed as a correctional officer for the North Carolina Department of Correction ("Defendant"), at Foothills Correctional Institution in Morganton, when he was injured during a work-related training exercise on 25 August 2005 ("the accident"). The accident occurred while Brown was participating in a training exercise during which Brown alleged he injured himself in a fall. Defendant filed a Form 19 "Employer's Report of Employee's Injury" that stated Defendant first became aware of the accident on 19 November 2005. Brown alleged he injured his lower back, left hip, and leg in the accident, but that Brown had not felt injured until the following day, and had not

received any medical treatment for the alleged injuries.[1] Brown filed a Form 18 "Notice of Accident to Employer" dated 13 December 2005, but this form was file stamped by the Commission on 27 December 2005. In this Form 18, Brown gave notice, "as required by law, that [he] sustained an injury[,]" and "[d]escribe[d] the injury . . ., including the specific body part involved (e.g., right hand, left hand)" as follows: "[l]ower [b]ack."

Defendant submitted a Form 61 "Denial of Workers' Compensation Claim," dated 4 January 2006, stating it was "without sufficient information to admit [Brown's] right to compensation." However, Defendant subsequently filed a Form 60 "Employer's Admission of Employee's Right to Compensation," dated 23 March 2006, in which Defendant "admit[ted Brown's] right to compensation for an injury by accident on 8/25/2005[.]" This Form 60 indicated that the "description of the injury . . . is: low back strain[,]" and calculated a weekly compensation rate of $378.11. The Form 60 did not include any alleged injuries to Brown's hip or leg. Defendant compensated Brown for his medical treatment related to his back injury while Brown continued to work full-time in 2005 and 2006. Brown underwent surgery for his compensable back injury in December 2007.

Brown filed a second Form 18 on 15 May 2007, again alleging he injured his back on 25 August 2005 when he "was participating in a training exercise[.]" Once again, in this second Form 18, Brown made *no* claim that he had sustained injuries to his left hip or leg as a result of the accident. Defendant "initiated payment of temporary total disability . . . benefits to [Brown] in June 2008 in relation to his compensable back injury." These payments continued until Brown's death. Brown was "assessed at maximum medical improvement" on 10 February 2009, and was "assigned a 15% permanent partial impairment rating to [his] back, and [was] written out of work on a permanent basis" due to his ongoing "chronic back pain."

Brown submitted a third Form 18, "Amended Notice of Accident to Employer," dated 7 October 2010, alleging for the first time that, as a result of the accident, he sustained injuries "[i]ncluding, but not limited to, [his] back *and left hip and leg*."[2] (emphasis added). In addition

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1. The record copy of this Form 19 is not signed by any representative of Defendant, does not include a date in the section labeled "Date Completed," nor does it include any file stamp. Assuming it was sent to the Commission as required, there is no record indication of when that occurred.

2. We note that some of the documentation is file stamped, whereas other documentation, such as this amended Form 18, is not. Because Defendant does not argue otherwise, we presume all record documentation was correctly filed on or near the dates, if any, included on that documentation.

to the "Amended Notice of Accident," Brown apparently filed a Form 33 "Request that Claim be Assigned for Hearing," also dated 7 October 2010, in which he alleged that he had "sustained *a compensable injury to his left hip* [during the 25 August 2005 exercise] which [was] being denied by [] Defendant[]." (emphasis added). We note that there is no record evidence that Brown ever claimed he had sustained a compensable injury to his left hip prior to this amended Form 18 that was apparently filed concurrently with his Form 33 requesting a hearing related to his alleged compensable hip injury. A hearing on the matter was set for 5 May 2011.

Two days before the hearing date, Brown filed a request that the matter be "postponed indefinitely as there are currently no issues in dispute between the parties" in order to allow the parties "to try to mediate [Brown's] claim[.]" Pursuant to Brown's request, a deputy commissioner filed an order on 9 May 2011 removing the matter from the "May 5, 2011 hearing calendar and the active hearing docket as there [were] no issues currently in dispute." The matter was referred to mediation. The Commission's opinion and award stated: "The parties reached an impasse in settlement discussions at mediation. However, [Brown] did not file a new Form 33 request for hearing on the denied claim of left hip injury at any point during his lifetime."

The Commission found that Brown "received significant medical treatment for his left hip from 2007 until his death[.]" This treatment included a total left hip replacement in 2008, "at which time [Brown] denied to the medical provider any specific injury to [his] hip." Brown underwent multiple additional surgical procedures related to his left hip replacement that were complicated by persistent infections. However, "Defendant did not authorize, direct, or pay for any left hip medical treatment[.]"

Temporary total disability benefits related to Brown's *back* injury, totaling $105,233.12, continued until Brown's death on 1 January 2014. Total medical benefits paid for Brown's compensable back injury amounted to $40,198.87. Brown's death certificate listed alcoholic cirrhosis as the immediate cause of death, and noted

> underlying causes of death as hepatic encephalopathy [– altered mental state resulting from alcoholic cirrhosis of the liver R62 –] for a period of weeks prior to death and chronic left hip and psoas muscle abscess refractory to antibiotics [– infection resistant to antibiotics resulting in abscess of hip and associated muscle, likely resultant of Brown's 2008 left hip replacement –] for approximately six years prior to the date of death.

Plaintiff, as Brown's next of kin, submitted a Form 33 "Request that Claim be Assigned for Hearing" dated 21 August 2014, in which she sought death benefits pursuant to N.C. Gen. Stat. § 97-38. In Plaintiff's Form 33, she claimed that the parts of Decedent's body that had been injured in the 25 August 2005 accident were his "[b]ack and hip." Defendant mailed a response to Plaintiff's Form 33, dated 9 December 2014, in which it stated: "Decedent sustained a compensable low back injury on August 25, 2005 during a training exercise. Defendant accepted [P]laintiff's claim as compensable and has paid all benefits to which [D]ecedent [was] entitled for his compensable [lower back] injury. Defendant denies that the August 25, 2005 injury proximately caused [D]ecedent's death." Defendant again identified the only compensable injury suffered by Decedent as "low back strain." The matter was set for a hearing before a deputy commissioner on 21 April 2015, but Plaintiff and Defendant agreed to proceed without a hearing, and the record in this matter was closed on 14 September 2015 after the deputy commissioner received depositions, briefs, and other materials. The deputy commissioner entered an opinion and award on 21 October 2015, in which he concluded, *inter alia*, that Plaintiff was entitled to payment of death benefits pursuant to N.C. Gen. Stat. § 97-38, and ordered Defendant to pay Plaintiff said benefits.

Defendant appealed the deputy commissioner's order to the Commission. Following a hearing on 8 March 2016, the Commission entered an opinion and award dismissing with prejudice Plaintiff's claims for (1) medical compensation related to Decedent's alleged hip injury, and (2) death benefits pursuant to N.C.G.S. § 97-38. The Commission concluded, *inter alia*, that (1) Decedent's cause of death was "unrelated to his compensable back injury[;]" and (2) Plaintiff's claim for death benefits based on Decedent's denied hip injury was time-barred under N.C.G.S. § 97-38. Plaintiff appeals.

## II. *Argument*

Plaintiff's sole argument on appeal is that the Commission erred by dismissing her claim for death benefits based on its conclusion that the claim was time-barred pursuant to N.C.G.S. § 97-38. We disagree.

### A. Standard of Review

"The standard of review for an opinion and award of the North Carolina Industrial Commission is (1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law." *Cox v. City of Winston-Salem*, 171 N.C. App. 112, 114, 613 S.E.2d

746, 747 (2005) (citation and internal quotation marks omitted). Plaintiff does not challenge the Commission's findings of fact; therefore, they are binding on appeal. *Hill v. Fed. Express Corp.*, 234 N.C. App. 488, 490, 760 S.E.2d 70, 73 (2014) (citation and internal quotation marks omitted). "The Industrial Commission's conclusions of law are reviewable *de novo* by this Court." *Moore v. City of Raleigh*, 135 N.C. App. 332, 334, 520 S.E.2d 133, 136 (1999) (citation omitted). Plaintiff's appeal also raises questions of statutory interpretation, which this Court considers *de novo*. *See In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012).

B. Analysis

Plaintiff's claim for death benefits is based upon N.C.G.S. § 97-38, which states in relevant part:

> If death [of an employee] results proximately from a compensable injury . . . and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 2/3 %) of the average weekly wages of the deceased employee at the time of the accident, . . . and burial expenses not exceeding ten thousand dollars ($10,000), to the person or persons entitled thereto[.]

N.C. Gen. Stat. § 97-38 (2015). N.C.G.S. § 97-38 confers a right to receive death benefits upon "beneficiaries of an injured worker whose death results from a compensable injury[.]" *Pait v. SE Gen. Hosp.*, 219 N.C. App. 403, 413, 724 S.E.2d 618, 626 (2012). "[T]he [beneficiary's] right to compensation is 'an original right . . . enforceable only after (the employee's) death.' " *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 466, 256 S.E.2d 189, 195 (1979) (citations omitted). Therefore, Brown's actions or inactions related to his potential compensation claims had no impact on Plaintiff's "original right" to recover pursuant to N.C.G.S. § 97-38.

> [A] death benefits claim [is] a distinct claim of the beneficiaries . . . . Specifically, our Supreme Court [has] stated:
>
> > [D]uring [the injured employee's] lifetime his [beneficiaries] were not parties in interest to the proceeding he brought for the enforcement of his claim. Their right to compensation did not arise until his death and their cause of action was not affected by anything he did[.]

> . . . The basis of their claim was an original right which was enforceable only after his death.
>
> Accordingly . . . a death benefits claim under the Workers' Compensation Act is a distinct claim to those beneficiaries upon the death of the injured [employee]. Notably, because the death benefits claim does not arise until the injured employee's death . . . the rights of the beneficiaries under the Act are not implicated until the injured employee's death.

*Pait*, 219 N.C. App. at 414, 724 S.E.2d at 626–27 (citations omitted).

In addition to the requirements of compensability and proximate causation, N.C.G.S. § 97-38 "imposes express time limitations on the accrual of death benefits claims." *Pait*, 219 N.C. App. at 413, 724 S.E.2d at 626. Specifically, N.C.G.S. § 97-38 requires payment of death benefits only "[i]f [the employee's] death results proximately from a compensable injury . . . and within six years thereafter, *or within two years of the final determination of disability, whichever is later*[.]" N.C.G.S. § 97-38 (2015) (emphasis added).

The accident occurred on 25 August 2005. Decedent died on 1 January 2014, and Plaintiff filed her Form 33 seeking death benefits pursuant to N.C.G.S. § 97-38 on 21 August 2014. Plaintiff acknowledges that Decedent did not die "within six years" of the accident and therefore her claim was not timely under that prong of the statute of limitations. However, Plaintiff argues that, because no final determination of disability was ever made, the second prong of the statute of limitations – the "final determination of disability" prong – renders her claim timely. *See* N.C.G.S. § 97-38 (providing that a claim is timely "[i]f death [of the employee] results proximately from a compensable injury . . . within two years of the final determination of disability").

This Court has held that, where there has been no final determination of disability with respect to a compensable injury, a claim for death benefits is not time-barred by the statute of limitations as set forth in N.C.G.S. § 97-38. *Shaw v. U.S. Airways, Inc.*, 217 N.C. App. 539, 543, 720 S.E.2d 688, 691 (2011). In *Shaw*, the Commission awarded death benefits to the plaintiff, the widow of a deceased employee. *Id.* at 540-41, 720 S.E.2d at 689-90. The employee had suffered a work-related back injury, and died eight years later. *Id.* at 540, 720 S.E.2d at 689. Prior to the employee's death, the employer admitted the compensability of the work-related back injury by filing a "Form 60, Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat.

§ 97–18(b)." *Id.* Following the employee's death, the plaintiff filed a Form 33 requesting a hearing on her right to death benefits pursuant to N.C. Gen. Stat. § 97-38, and death benefits were granted. *Shaw*, 217 N.C. App. at 540–41, 720 S.E.2d at 689–90. In *Shaw*, the defendants appealed, arguing that the plaintiff's N.C.G.S. § 97-38 claim was barred by the statute of limitations. *Shaw*, 217 N.C. App. at 542, 720 S.E.2d at 690. Because it was undisputed that the compensable injury in *Shaw* occurred more than six years prior to the employee's death, this Court analyzed the "final determination of disability" prong of the statute of limitations to determine the timeliness of the plaintiff's claim:

> As noted by the Commission in the opinion and award entered 17 December 2010, defendants paid temporary total disability to [the employee] pursuant to a Form 60 and subsequent Form 62. Entry of these forms raises only a presumption of disability, not a final determination.
>
> > Under the Workers' Compensation Act, disability is defined by a diminished capacity to earn wages, not by physical infirmity. Thus, the employee has the burden "to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment."
>
> There is nothing in the record to indicate that [the employee] was paid anything other than temporary total benefits pursuant to Forms 60 and 62.
>
> Therefore, as there was no determination of [the employee]'s final determination of disability prior to the Commission's 17 December 2010 opinion and award determining that his death was the proximate result of his 12 July 2000 compensable injury, [the plaintiff's] 8 April 2009 claim for death benefits was not untimely and not barred by the statute of limitations under N.C. Gen. Stat. § 97–38.[3]

*Shaw*, 217 N.C. App. at 542–43, 720 S.E.2d at 690–91 (citations omitted).

Plaintiff contends, relying on *Shaw*, that because "there [had been] no final determination of disability [with respect to Decedent's

3. We note that the relevant inquiry is whether the employee's *death* occurred within two years of the final determination of disability. Because no final determination of disability was ever made, this Court in *Shaw* determined that the two-year limitations period of this prong had never started to run and, therefore, it could not serve to bar the plaintiff's claim.

compensable *back* injury] at the time of [Decedent's] death," Plaintiff's death benefits claim, based on Decedent's alleged *hip* injury, could be "filed more than six years from the date of accident *regardless of the injury that form[ed] the basis of the . . . claim*." (emphasis added). In other words, Plaintiff argues that because Decedent had a compensable *back* injury for which no final determination of disability was ever made, she was free to bring her N.C.G.S. § 97-38 claim based on Decedent's *hip* injury at any time – that, on the facts before us, *no* limitations period applied to her claim.

However, this Court in *Shaw* held that, because the employee's *compensable back injury had proximately caused his death* and that because there had been no "final determination of disability" *with respect to that compensable back injury*, the plaintiff's claim for death benefits was not untimely pursuant to N.C.G.S. § 97-38. *Id.* at 541, 720 S.E.2d at 690-91. Nothing in *Shaw* suggests that failure to make a final determination of disability for a compensable injury that was *not* a proximate cause of an employee's death tolls the N.C. Gen. Stat. § 97-38 statute of limitations.

In the present case, Brown filed a Form 18, "Notice of Accident," on 20 February 2006, claiming that on 25 August 2005 he sustained a work-related accident to his lower back. Defendant filed a Form 60 on 23 March 2006, admitting Brown's right to compensation for the "low back strain" resulting from his 25 August 2005 "injury by accident." Defendant never filed a Form 60 admitting compensability for any injury to Brown's left hip, nor did the Commission ever make a determination that the hip injury was a compensable work-related injury.

In its opinion and award, the Commission recognized the difference between the facts of *Shaw* and those in the present case, finding that "[P]laintiff [was] not entitled to use [D]ecedent's disability status resulting from his *compensable back injury* to pursue her claim of benefits for death proximately resulting from [D]ecedent's *denied left hip injury* using the two-year statute of limitations provision [in N.C. Gen. Stat. § 97-38]." (emphasis added). We reject Plaintiff's argument that, in the absence of a final determination of disability with respect to Decedent's compensable back injury, Plaintiff's claim for death benefits based on Decedent's hip injury, which was never determined to be compensable, was *per se* timely under N.C.G.S. § 97-38.

Under the Workers' Compensation Act, "compensability" and "disability" are distinct concepts, involving different elements of proof. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492-93 (2005). Thus,

an employee must prove that he has a compensable injury *before* there can be any "determination of disability." *Id.* at 44, 619 S.E.2d at 493 ("[D]efendants fully admitted the compensability of the [employee's] injury, leaving her only to prove her disability in order to receive continued compensation. [T]he law in North Carolina is well settled that an employer's admission of the 'compensability' of a workers' compensation claim does not give rise to a presumption of 'disability' in favor of the employee.").

We hold that the phrase "final determination of disability," as used in N.C.G.S. § 97-38, is limited to the final determination of disability for the compensable injury that is *specifically alleged to have proximately caused the employee's death.* N.C.G.S. § 97-38 ("[i]f death results *proximately from a compensable injury* . . . within two years of the final determination of disability, . . . the employer shall pay . . . weekly payments of compensation") (emphasis added). The final determination of disability for a compensable injury cannot be made unless *the compensability of such injury has already been established.* We note that N.C.G.S. § 97-38 refers to "*the* final determination of disability," not "*a* final determination of disability." This supports our interpretation that the statute contemplates a determination of disability *with respect to the specific injury which forms the basis of the claim for death benefits. See N.C. Dept. of Correction v. N.C. Medical Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used.").

This Court has previously rejected interpretations of N.C.G.S. § 97-38 that "would lead to absurd results, contrary to the manifest purpose of our Legislature[.]" *Pait*, 219 N.C. App. at 415, 724 S.E.2d at 627. As the Commission in the present case concluded, "[t]o accept [Plaintiff's] argument would allow an individual to delay pursuing a claim of benefits for death proximately resulting from a denied injury on an indefinite basis and would subvert the overriding purpose of having a statute of limitations, which is to prevent the litigation of stale claims." *See, e.g.*, *Trexler v. Pollock*, 135 N.C. App. 601, 606-07, 522 S.E.2d 84, 88 (1999) (rejecting interpretation of statute that "would result in a virtually unlimited statute of limitations" for certain claims, and noting that "[s]tatutes of limitations exist for a reason – to afford security against stale claims.").

We recognize that the application of any statute of limitations may result in hardship to a plaintiff. As our Supreme Court has acknowledged,

> application of [N.C. Gen. Stat. §] 97-38 may sometimes have the effect of barring an otherwise valid and provable claim simply because the employee did not die within the requisite period of time. . . . The remedy for any inequities arising from the statute, however, lies not with the courts but with the legislature.

*Booker v. Duke Medical Center*, 297 N.C. 458, 483-84, 256 S.E.2d 189, 205 (1979); *see also Joyner v. J.P. Stevens & Co.*, 71 N.C. App. 625, 627, 322 S.E.2d 636, 637-38 (denying plaintiff's claim for benefits as untimely under the version of N.C.G.S. § 97-38 in effect at the time of employee's death, and noting that "[the] holding [was] a harsh but necessary result of the statutory scheme"). However, we do not believe the General Assembly intended the absurd result of excluding from *any* statute of limitations claims under N.C.G.S. § 97-38 based upon injuries *that had never been found to be compensable*, simply because some different injury – not a proximate cause of the employee's death – had been found compensable, but no final determination of disability for that injury had been made.

## III. *Conclusion*

For the reasons stated above, we hold the Commission did not err in denying Plaintiff's claim for death benefits as time-barred pursuant to N.C.G.S. § 97-38.

AFFIRMED.

Judges DAVIS and TYSON concur.

FRIENDS OF CROOKED CREEK, L.L.C.; MARK BERTRAND; DONNA BERTRAND; SYLVIA T. TERRY; ROBERT F. ZAHN; AND MICHELLE R. ZAHN, PLAINTIFFS
v.
C.C. PARTNERS, INC. AND CROOKED CREEK GOLF LAND LLC, DEFENDANTS

No. COA17-32

Filed 18 July 2017

**1. Declaratory Judgments—golf course property—closure of golf course—development of property into residential lots—restrictive covenants**

The trial court did not err by granting summary judgment in favor of defendants in a declaratory judgment action seeking to declare golf course property as burdened by a Declaration and its restrictive covenants limiting it to golf-related uses. The hazard clause did not describe a specific required use or restriction on the retained property, or sufficiently describe any property to be bound to perpetual restrictions, and the law presumes the free and unrestricted use of land.

**2. Declaratory Judgments—plat maps—community promotion materials—easement-by-plat—golf course property**

The trial court did not err in a declaratory judgment action by concluding that plat maps and community promotion materials did not impose an easement-by-plat that required golf course property to be perpetually used only for golf. While the subdivision may have been contemplated and marketed as a golf course community to induce plaintiff lot owners to purchase lots, no case has recognized an implied easement or restrictive covenants being imposed on undeveloped land based upon statements in marketing materials.

Appeal by plaintiffs from order entered 5 August 2016 by Judge G. Wayne Abernathy in Wake County Superior Court. Heard in the Court of Appeals 15 May 2017.

*Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for plaintiff-appellants.*

*Parker Poe Adams & Bernstein LLP, by Russell B. Killen, Jamie S. Schwedler and Michael J. Crook, for defendant-appellees.*

TYSON, Judge.

Friends of Crooked Creek, L.L.C., Mark and Donna Bertrand, Sylvia T. Terry, and Robert F. and Michelle R. Zahn ("Plaintiffs") appeal from an order denying their motion for summary judgment and granting summary judgment in favor of Defendants. We affirm.

## I. Background

In 1992, C.C. Partners, Inc. ("C.C. Partners") purchased a tract of real property situated in Fuquay-Varina, North Carolina and sub-divided portions of the property into single-family residential lots. C.C. Partners intended for the Crooked Creek subdivision to be developed as a golf course community, and retained a portion of the property to construct a golf course. C.C. Partners did not dedicate or convey the un-subdivided areas to the lot owners or the homeowner's association, or designate the areas as common area.

In 1992 and 1993, C.C. Partners recorded two plats of the subdivision, which showed the creation of residential lots. Although the construction of a golf course was contemplated by C.C. Partners on its retained property, neither of these plats depicts a golf course. The plats did not set forth any indication that the property retained by C.C. Partners was to be restricted to a golf course, or a perpetual amenity or common area for the benefit of the lot owners. The plats depict golf-themed street names, such as "Tee Box Court" and "Shady Greens Drive."

The 1992 plat contains Note 6, which states and reserves: "Lots fronting golf course shall allow limited access to property to retrieve golf balls and or complete maintenance as required to facilitate play by golfers . . . ." The plat recorded in 1993 contains Note 6 and a new Note 5, which states and reserves: "Golf course owner and developer reserve the right to encroach upon any lot for 10' on all sides if necessary for utility easement and irrigation system."

In 1993, C.C. Partners recorded a Declaration of Covenants, Conditions and Restrictions for Crooked Creek Subdivision ("the Declaration"). The Declaration makes several references to a proposed golf course, which are set forth and discussed *infra*.

In 1994, C.C. Partners recorded plats showing the creation of additional residential lots. None of these plats depict or label any area for a golf course, or contain any indication that the retained property was to be a perpetual amenity or common area to either benefit the lot owners or be maintained by C.C. Partners. The plats include Notes 5 and 6, as stated above, as well as new Note 11, which states and reserves: "Lots fronting golf course shall allow golf course encroachment up to

50 feet from rear or side lot lines to facilitate golf course construction and play." The subsequent plats also contain these Notes, although their designated numbers vary from plat to plat.

From 1992 to March 1995, C.C. Partners sold lots to builders, who sold the lots to homeowners. C.C. Partners began construction of a golf course on a portion of the original tract in 1993.

C.C. Partners and subsequent developers heavily marketed the subdivision as a "golf course community" with an "18-hole golf course." For example, a marketing brochure stated the "[i]nitiation fee for membership in the Crooked Creek Golf Club will be waived for the first 20 home buyers in Crooked Creek."

In December 1994, C.C. Partners entered into a contract to sell undeveloped portions of the Crooked Creek subdivision to MacGregor Development Company ("MacGregor"), a party unrelated to this lawsuit. The property to be conveyed consisted of twenty-four previously subdivided residential lots and five un-subdivided tracts of land.

In preparation for the closing, C.C. Partners had a survey completed to reflect the property to be sold to MacGregor. The owners of C.C. Partners testified by affidavit that the purpose of this survey plat was to provide a legal description of the property to be sold to MacGregor.

In February 1995, C.C. Partners recorded a plat entitled "Map of Crooked Creek Golf Course and Subdivision," which depicts a dash-lined sketch of an 18-hole golf course, tee boxes, fairways and greens, a driving range, the clubhouse, and other golf features. The plat also depicts five bold or hard-lined boundary acreage tracts, labeled "A," "B," "C," "D" and "F."

Tracts A, B, C, D and F were conveyed to MacGregor in March 1995, and MacGregor became the developer of further residential lots in Crooked Creek. C.C. Partners remained the owner and developer of the golf course. Construction of the golf course and clubhouse was completed after the conveyance to MacGregor in March 1995.

The deed from C.C. Partners to MacGregor references the 1995 plat, which depicts the dash-lined outline of the golf course and adjoining properties. The deed does not include any use restrictions on the property retained by C.C. Partners.

MacGregor began to subdivide tracts A, B, C, D and F to create new residential lots and sold the lots to buyers. MacGregor was solely responsible for the marketing and sale of the lots in Crooked Creek.

However, according to the deposition of C.C. Partners' plurality shareholder, C.C. Partners and MacGregor were "trying to work together . . . to sell golf and sell lots" in the years that followed the transfer of the residential lots to MacGregor.

For example, an area inside the golf clubhouse featured advertisements and a sales center for homes for sale within Crooked Creek. Advertisements for homes for sale referenced the golf course, and promoted "golf course homesites." Around 2005, C.C. Partners issued a flyer that offered a $1,000.00 discount on golf club initiation fees "to Crooked Creek Homeowners."

Crooked Creek Residential Properties, LLC recorded several plat maps subsequent to C.C. Partners' 1995 conveyance of tracts A, B, C, D and F. Those maps depict subdivision of the tracts purchased by MacGregor, and show land abutting residential lots labeled "Portion of Crooked Creek Golf Course."

On 31 December 2002, C.C. Partners transferred approximately one-half of the golf course property to Crooked Creek Golf Land, LLC ("CCGL"). No taxable consideration was stated and no revenue stamps were paid for the transfer of the property. The transaction was solely designed to facilitate a conservation easement. Statements averred C.C. Partners and CCGL are "one and the same."

Crooked Creek Golf Club experienced financial hardships during the recession beginning in 2008, and did not fully recover. C.C. Partners thereafter publically announced its intention to close the golf course and subdivide the golf course property into residential lots. The Crooked Creek Golf Club closed permanently on 5 July 2015, sold most of its assets, and has not maintained the property as a golf course since that time. C.C. Partners and CCGL have entered into a contract to sell twenty-one acres of the property to the Wake County Public School System.

Plaintiff, Friends of Crooked Creek, LLC ("FOCC"), is a limited liability company formed in 2014, whose membership consists entirely of Crooked Creek lot owners. FOCC's stated goal is to preserve the beauty, value, and livability of Crooked Creek. None of FOCC's seventy-eight members' deeds reference the 1995 plat, which shows the dotted outline of a golf course.

Plaintiffs filed suit on 15 June 2015, and sought a declaratory judgment to declare the golf course property is subject to the Declaration, which restricts the property to golf related uses. Plaintiffs also sought injunctive relief to prevent the closure of the golf course and

development of the golf course property into residential lots, which the trial court denied on 2 July 2015.

Defendants filed a motion for summary judgment on 22 February 2016, and Plaintiffs filed a motion for summary judgment on 15 March 2016. By Order filed 5 August 2016, the trial court denied Plaintiffs' motion for summary judgment and granted summary judgment in favor of Defendants on all issues. Plaintiffs appeal.

## II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

## III. Whether the Property is Burdened by a Golf Only Use

Plaintiffs argue the trial court erred by granting summary judgment in favor of Defendants and denying their motion for summary judgment where: (1) C.C. Partners burdened the golf course property with a Declaration that promised the golf course would be used only for golf related purposes; and, (2) C.C. Partners' plat maps and community promotions imposed an easement-by-plat that the golf course property would be used only for golf related purposes in perpetuity.

### A. Standard of Review

> Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

*In re Will of Jones*, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576-77 (2008) (internal citations, quotation marks, and brackets omitted).

### B. The Declaration

**[1]** Plaintiffs argue the property developed as a golf course is burdened by the Declaration and its restrictive covenants, which promised the

Crooked Creek lot owners that the property would be developed as a golf course and used only for golf. We disagree.

"In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of all the covenants contained in the instrument or instruments creating the restrictions." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967).

> Covenants and agreements restricting the free use of property are *strictly construed against limitations upon such use*. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, *or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.*
>
> Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.

*Id.* (citation and quotation marks omitted) (emphasis supplied).

"Restrictive covenants cannot be established except by a[n] instrument of record containing adequate words so unequivocally evincing the party's intention to limit the free use of the land that its ascertainment is not dependent on inference, implication or doubtful construction." *Marrone v. Long*, 7 N.C. App. 451, 454, 173 S.E.2d 21, 23 (1970) (citing *Turner v. Glenn*, 220 N.C. 620, 18 S.E.2d 197 (1942)). " 'The courts are not inclined to put restrictions in deeds where the parties left them out.' " *Id.* (quoting *Hege v. Sellers*, 241 N.C. 240, 249, 84 S.E.2d 892, 899 (1954)).

The Declaration, which was recorded by C.C. Partners in 1993, references a golf course. The "golf course" is defined under the Declaration as "the Crooked Creek golf course (or to such other name given to same), including all related and appurtenant facilities thereto . . . ., which Declarant *contemplates* developing out of a portion of the Property or out of other real property adjoining or located near the Property." (emphasis supplied).

Plaintiffs argue the Declaration imposed a covenant that the subdivision would contain a golf course. Plaintiffs assert this enforceable, express covenant is set forth in Article XII, Section 15 of the Declaration, which states:

> Declarant hereby informs all Owners of the Lots subject to this Declaration . . . that the lots subject to this Declaration *are part of a subdivision plan approved by Wake County, North Carolina, which approved subdivision plan contains a golf course and related facilities (previously defined hereinabove as the "Golf Course")*. Declarant hereby informs all Owners of Lots in the Subdivision that certain provisions of this Declaration have been written for the purpose of enhancing the use and value of the Golf Course and to protect the rights of the owners of the Golf Course and those Persons lawfully using the Golf Course.
>
> Declarant hereby further informs all such Owners . . . that there exists certain hazards or risks associated with the ownership and use of property located adjacent to or near a Golf Course, . . . and Declarant hereby reserves for the owners of the Golf Course . . . a perpetual, non-exclusive easement to enter onto Lots in the Subdivision for the purpose of retrieving golf balls . . . . (emphasis supplied).

Section 15 is clearly a hazard and risks disclosure clause to lot owners, a reservation for golfers to enter on to lots to retrieve balls, and is not a use restriction, covenant or easement conveyed to lot owners. The hazard clause incorporates the definition of "golf course" under the Declaration, which merely refers to a "contemplated" golf course.

We decline to interpret this clause to impose a perpetual burden on the property, where a burden was not plainly contemplated. *See Marrone*, 7 N.C. App. at 454, 173 S.E.2d at 23. "[N]othing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports." *Julian v. Lawton*, 240 N.C. 436, 440, 82 S.E.2d 210, 212 (1954) (citation omitted).

Furthermore, "[r]estrictions will not be aided or extended by implication or enlarged by construction to affect lands *not specifically described*, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply." *Long*, 271 N.C. at 268, 156 S.E.2d at 239. The hazard clause does not describe a specific, required use or restriction on the retained property, or sufficiently describe any property to be bound to perpetual restrictions.

Plaintiff's proffered interpretation of the hazard clause also runs contrary to other unambiguous provisions of the Declaration. The Declaration further provides:

> The Golf Course property also shall be exempt from the assessments and liens for same created herein. Provided, however, *if at any time in the future any part or all of the Golf Course property shall be subdivided into Lots intended for single-family residential use or used for multi-family residential purposes*, then the exemption from assessments and liens for such part or all of the Golf Course property shall terminate and the same shall become subject to assessments and liens as provided herein for Lots and multi-family residential property. (emphasis supplied).

This clause plainly states the retained property may not always be used as a golf course, and the "Golf Course property" could later be developed into lots or other uses. The Declaration also includes an express right of access to common area property for lot owners, but does not designate any of C.C. Partners' retained property as common area property. The Declaration does not provide or convey lot owners any right of access or use to the retained property.

Absent a specific restriction within the Declaration, the law presumes the free and unrestricted use of land. *See Long*, 271 N.C. at 268, 156 S.E.2d at 238. The trial court properly observed and stated: "An intent to build a golf course is not necessarily the same [as] the intent to burden [the] land in perpetuity for golf use only." When interpreted as a whole, the Declaration clearly shows the intent of C.C. Partners was to reserve the right to develop a golf course, which was, in fact, developed and operated for over twenty years, rather than to perpetually restrict the use of the property. Plaintiffs arguments are overruled.

C. Implied Easement

**[2]** Plaintiffs also argue C.C. Partners' plat maps and community promotion materials imposed an easement-by-plat, requiring the golf course property to be perpetually used only for golf. We disagree.

> It is a settled principle in this State that when the owner of land, located within or without a city or town, has it subdivided and platted into lots, streets, alleys, and parks, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates

> the streets, alleys, and parks, and all of them, to the use of the purchasers, and those claiming under them, and of the public.

*Gaither v. Albemarle Hosp., Inc.*, 235 N.C. 431, 443, 70 S.E.2d 680, 690 (1952).

> The general rule is based on principles of equitable estoppel, because purchasers who buy lots with reference to a plat are induced to rely on the implied representation that the "streets and alleys, courts and parks" shown thereon will be kept open for their benefit. Consequently, the grantor of the lots is "equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created."

*Harry v. Crescent Resources, Inc.*, 136 N.C. App. 71, 77, 523 S.E.2d 118, 122 (1999) (quoting *Gaither*, 235 N.C. at 444, 70 S.E.2d at 690).

For an easement implied-by-plat to be recognized, the plat must show the developer clearly intended to restrict the use of the land at the time of recording for the benefit of all lot owners. *See id.* (holding that because the free use of property is favored in this State, the depiction of remnant parcels on the plat was insufficient to show a clear intent by the developer to grant an easement setting them aside as open space).

Here, the 1995 survey plat relied upon by Plaintiffs does not show an intent to restrict the uses of the golf course property. The survey plat reflects five un-subdivided tracts of land labeled as "A, B, C, D and "F," some previously subdivided lots, and the dotted line location of the golf course greens and fairways. Metes and bounds descriptions are shown *only* for the five un-subdivided tracts. The 1995 survey plat did not create any residential lots and only carved out the five tracts, A, B, C, D and F, from the original tract. All residential lots shown on the survey plat were previously subdivided and were shown on the 1995 survey plat for illustrative purposes.

This fact renders the rule in *Gaither* inapplicable here. *See Gaither*, 235 N.C. at 443, 70 S.E.2d at 690 (An implied easement may be recognized in favor of the lot purchaser "when the owner of land . . . has it subdivided and platted into lots, streets, alleys, and parks, and sells and conveys the lots or any of them with reference to the plat.").

The implied-by-plat rule in *Gaither* is also inapplicable at bar, because C.C. Partners did not sell any residential lot to any Plaintiff by reference to the survey plat. Plaintiffs purchased a total of seventy-eight

lots in Crooked Creek. *None* of these deeds reference the 1995 survey plat Plaintiffs claim they relied upon.

In *Cogburn v. Holness*, 34 N.C. App. 253, 237 S.E.2d 905 (1977), potential purchasers of a former golf course argued the land was burdened by an easement implied-by-plat, which limited the use of the property to golf activities. The plats referred to in the plaintiffs' deeds did "not show nor even contain a reference to a golf course," even though plats earlier in the chain of title did. *Id.* at 259, 237 S.E.2d at 908. This Court held the deeds failed to establish a dedication of land for a golf course or a restriction on development. *Id.* at 259-60, 237 S.E.2d at 908-09.

The same is true in this case. None of Plaintiffs' deeds reference plats recorded by C.C. Partners, which depict a golf course. The plats, which depict a dotted outline of a golf course do not bind the land for golf use for the benefit of Plaintiffs or create any easement or common use right to the property.

Plaintiffs rely primarily on this Court's decision in *Shear v. Stevens Bldg. Co., Inc.*, 107 N.C. App. 154, 418 S.E.2d 841 (1992). In *Shear*, residential lots were sold by the developer in the subdivision known as Cardinal Hills in Raleigh. *Id.* at 157, 418 S.E.2d at 845. The plat map for Cardinal Hills, filed in 1956 and revised in 1957, depicted approximately three hundred subdivided lots. *Id.* The plat map also depicted a lake known as White Oak Lake, and undeveloped areas surrounding the lake, which included a future playground. *Id.* at 160-61, 418 S.E.2d at 845. Neither the deeds nor the restrictive covenants referenced any easement relating to use of the lake. *Id.*

The plaintiffs in *Shear* presented evidence tending to show that lot purchasers were told the use of White Oak Lake was for residents of Cardinal Hills; that residents of the subdivision commonly used the lake; residents were told that the undeveloped land around the lake was for the use of the community; and that residents were encouraged to maintain the portion of the undeveloped land adjoining their properties. *Id.* at 157-58, 418 S.E.2d at 843. The developer advertised "lakefront" lots for sale in Cardinal Hills, and described the lots as overlooking "one of Wake County's most beautiful lakes." *Id.* at 158, 418 S.E.2d at 843-44.

In 1988, the developers learned the earthen dam, which created White Oak Lake, was in need of repairs. *Id.* at 159, 418 S.E.2d at 843. Instead of repairing the dam, the developers partially drained and lowered the lake, which created additional undeveloped lands surrounding the lake. *Id.* The developers then filed a plat map in 1988, which divided

the undeveloped land around the lake and the additional land obtained by draining the lake, into twenty-four lots. *Id.*

This Court held a lot owner's easement to the lake existed, solely because all deeds to lots sold in Cardinal Hills referenced the plat map, which showed the lake. *Id.* at 161, 418 S.E.2d at 846. The Court further noted that "oral representations and actions" by the developers "concerning the lake and the surrounding undeveloped property necessarily include the undeveloped areas around the lake in the scope of the easement." *Id.* at 163, 418 S.E.2d at 846. "These representations and actions, along with the use of the plat map and its depiction of the lake and property, decidedly show an intent to create an easement to the lake and surrounding undeveloped property." *Id.*

The facts of this case are distinguishable from those before this Court in Shear. Most notably, the deeds to the lots in *Shear* referenced a plat map, which showed the lake. Here, none of Plaintiffs' deeds referenced the 1995 survey map, which carved out the five tracts to be sold to MacGregor. Furthermore, the restrictive covenants in *Shear* were silent as to the potential for future development of the lake, unlike the future development clause in this case. For these reasons, *Shear* does not support Plaintiffs' claim.

While Crooked Creek subdivision may have been contemplated and marketed as a golf course community to induce Plaintiffs to purchase lots in the subdivision, no case has recognized an implied easement or restrictive covenants being imposed on undeveloped land, based upon statements in marketing materials. Courts have recognized marketing materials as further demonstrating the expressed intent of the developer, but only where a recorded instrument exists to demonstrate the intent to encumber and restrict the land. *See id.*; *see also Cogburn*, 34 N.C. App. at 259-60, 237 S.E.2d at 908-09. That is not the circumstances present in this case.

## IV. Conclusion

"Restrictive servitudes in derogation of the free and unfettered use of land are to be strictly construed so as not to broaden the limitation on the use." *Reed v. Elmore*, 246 N.C. 221, 224, 98 S.E.2d 360, 363 (1957). Plaintiffs have failed to show C.C. Partners intended to restrict the golf course property to a perpetual golf-only use where: (1) the Declaration does not contain any express language restricting the uses of the property; (2) the Declaration specifically allows for the future development of the "Golf Course property" into residential lots or other uses; (3) the 1995 survey map relied upon by Plaintiffs is not referenced in any of

Plaintiffs' deeds; and, (4) the 1995 survey map does not establish any residential lots and was prepared for the purpose of conveying the five large undeveloped tracts, A, B, C, D, and F.

The trial court correctly denied Plaintiffs' motion for summary judgment and granted summary judgment in favor of Defendants. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

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IN THE MATTER OF C.S.L.B., C.P.R.B., S.C.R.B.

No. COA16-1283

Filed 18 July 2017

**1. Child Abuse, Dependency, and Neglect—failure to make findings—reunification as a permanent plan not eliminated**

The trial court did not err in a child neglect and dependency case by failing to make the findings required by N.C.G.S. § 7B-906.2(b) where the court did not eliminate reunification as a permanent plan for the children, and thus, was not required to make the findings.

**2. Child Abuse, Dependency, and Neglect—closing juvenile case to further review hearings—relieving DSS and guardian ad litem of responsibilities**

The trial court erred in a child neglect and dependency case by closing the juvenile case to further review hearings and by relieving the Department of Social Services and the guardian ad litem of further responsibilities where the trial court designated relatives as guardians of the children, found the children had resided with their guardians for at least one year, and concluded the children's placement with their relatives was stable and in their best interests. However, the order was silent as to whether all parties were aware that the matter could be brought into court for review by the filing of a motion or on the court's own motion.

Appeal by respondent-mother from order entered 20 September 2016 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 22 June 2017.

*Holcomb and Stephenson, LLP, by Carol J. Holcomb, for petitioner-appellee Orange County Department of Social Services.*

*Robert W. Ewing for respondent-appellant mother.*

*Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.*

BERGER, Judge.

Respondent-mother appeals from a permanency planning order that granted guardianship of her child C.S.L.B. ("Cathy") to Cathy's maternal grandmother, T.B. ("Teresa"), and guardianship of her children C.P.R.B. ("Callie") and S.C.R.B. ("Sarah") to their maternal aunt, S.B. ("Sandra").[1] We affirm the awards of guardianship, but vacate the order in part and remand for adoption of an appropriate visitation plan, and further review and permanency planning hearings.

On March 4, 2015, the Orange County Department of Social Services ("OCDSS") filed petitions alleging Cathy, Callie, and Sarah were neglected and dependent juveniles based on allegations that Respondent-mother suffered from substance abuse and mental health issues. Respondent-mother entered into a safety plan with OCDSS that provided, in part, the children would remain in her home; their father would stay in the home to help care for them; and Teresa would go to the home each day to check on them. The children were found to be dependent juveniles pursuant to a consent order entered March 10, 2015; however, the order provided that it was in the children's best interest to remain in the parents' home.

On April 15, 2015, OCDSS obtained non-secure custody of the children. The trial court held a hearing the next day, and entered an order on May 1, 2015 continuing custody of the children with OCDSS, but ordering Cathy be placed with Teresa, and Callie and Sarah be placed with Sandra.

The trial court continued custody of the children with OCDSS and their placements with Teresa and Sandra in subsequent custody review orders. The court held a permanency planning hearing on November 19, 2015, and set the permanent plan for the children as reunification with a concurrent plan of guardianship. Reunification with guardianship as a secondary plan remained the permanent plan for the juveniles through

1. Pseudonyms are used throughout to protect the identity of the children pursuant to N.C.R. App. P. 3.1(b), and for ease of reading.

July 14, 2016, whereupon the court set the primary plan as guardianship with a relative and the secondary plan as reunification.

After an August 4, 2016 hearing, the trial court entered a permanency planning order on September 20, 2016 that awarded guardianship of Cathy to Teresa, and guardianship of Callie and Sarah to Sandra. The order granted Respondent-mother weekly unsupervised visitation with the children, closed the matter to further reviews, and relieved OCDSS and the children's guardian ad litem from further responsibility in the case. Respondent-mother filed timely notice of appeal from this order.

**[1]** Respondent-mother first argues the trial court erred in removing reunification as a permanent plan for the children without making the findings required by N.C. Gen. Stat. § 7B-906.2(b) (2016). Citing to this Court's opinion in *In re N.B.*, 240 N.C. App. 353, 771 S.E.2d 562 (2015), Respondent-mother contends that the secondary plan of reunification was eliminated when the trial court granted guardianship over the children, closed the juvenile case, and relieved OCDSS of further responsibilities. Although we agree with Respondent-mother that the trial court did not make the findings mandated by Section 7B-906.2(b) in this case, Respondent-mother is mistaken that the trial court eliminated reunification as a permanent plan for the children. Respondent-mother conflates removing reunification as a permanent plan for the children with ceasing reunification efforts. In *N.B.*, this Court held that a trial court "effectively ceases reunification efforts by (1) eliminating reunification as a goal of [the children's] permanent plan, (2) establishing a permanent plan of guardianship with [the proposed guardians], and (3) transferring custody of the children from [DSS] to their legal guardians." *Id.* at 362, 771 S.E.2d at 568 (citations omitted).

Here, even though the trial court established guardianships for Cathy, Callie, and Sarah, the trial court specifically found that "[t]he best plan of care for the juveniles to achieve a safe, permanent home is a primary permanent plan of guardianship with a relative with a secondary plan of reunification[.]" Because the court did not eliminate reunification as a permanent plan for the children, the court was not required to make the findings mandated by Section 7B-906.2(b), and it did not err in failing to do so.

**[2]** Next, Respondent-mother argues the trial court erred in closing the juvenile case to further review hearings. A trial court may waive further review and permanency planning hearings in a juvenile case

> if the court finds by clear, cogent, and convincing evidence each of the following:

> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n) (2016). Our "review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citations omitted).

Here, the trial court designated relatives as guardians of the children, found the children had resided with their guardians for at least one year, and concluded the children's placement with their relatives was stable and in their best interests. The trial court's order, however, is silent as to whether all parties were aware that the matter could be brought into court for review by the filing of a motion or on the court's own motion.

Moreover, by leaving reunification as a secondary permanent plan for the children, Respondent-mother continued to have the right to have OCDSS provide reasonable efforts toward reunifying the children with her, and the right to have the court evaluate those efforts. *See* N.C. Gen. Stat. § 7B-906.1(d)-(e) (2016) (requiring the trial court to make findings at review and permanency planning hearings regarding efforts to reunite parents with their children); *see also* N.C. Gen. Stat. § 7B-906.2(b) (2016) (providing that until reunification is removed as a permanent plan for a juvenile, "[t]he court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile"). Accordingly, the trial court erred in ceasing further review hearings and relieving OCDSS and the guardian ad litem of

further responsibilities in this case, and we must vacate this portion of its order.

Respondent-mother also argues the trial court erred in adopting the visitation plan set forth in the guardianship order, because the court improperly delegated its authority to the guardians. We agree.

Section 7B-905.1 of the North Carolina Juvenile Code provides:

> (a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety. The court may specify in the order conditions under which visitation may be suspended.
>
> . . . .
>
> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1 (2015). "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) (citations omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted). However, the trial court may not delegate its judicial function of awarding visitation to the custodian of a child. *See In re J.D.R.*, 239 N.C. App. 63, 75, 768 S.E.2d 172, 180 (2015).

Here, the trial court's order awarding visitation provides in pertinent part:

> [Respondent-mother] shall have a minimum visitation schedule with [Cathy, Callie, and Sarah] as follows:
>
> . . . .
>
> Visits shall occur unsupervised for four hours a week upon leaving the Daybreak program provided

> [Respondent-mother] tests negative and there is *no concern* she is using. She should not leave the children alone with anyone else during visitation, unless it is [with a family member]. Visits can become longer and more frequent with every six months of clean time outside the program. Visits should return [to] supervised or be suspended if [Respondent-mother] tests positive for [illegal] substances, if there is *concern* she is using, or if there is *concern* for discord between [Respondent-mother] and [the children's father] during visits.

(Emphasis added). Although this visitation provision complies with the requirements of Section 7B-905.1, it improperly delegates the court's judicial function to the guardians by allowing them to unilaterally modify Respondent-mother's visitation. Accordingly, we must vacate the trial court's visitation award because it leaves Respondent-mother's visitation to the discretion of the guardians based on their "concerns." *See Id.* at 75-76, 768 S.E.2d at 179-80 (custodian/guardian cannot determine visitation plan).

Respondent-mother does not otherwise challenge the order appointing guardians for Cathy, Callie, and Sarah, and, except as discussed above, the trial court's order is affirmed.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges ELMORE and TYSON concur.

**IN RE D.E.M.**

[254 N.C. App. 401 (2017)]

IN THE MATTER OF D.E.M.

No. COA16-1319

Filed 18 July 2017

**1. Termination of Parental Rights—grounds for termination—willful abandonment**

The trial court did not err in a termination of parental rights case by adjudicating that grounds existed to terminate respondent mother's parental rights under N.C.G.S. § 7B-1111(a)(7) for willful abandonment where the mother made no effort to contact the child and paid nothing toward his support during the pertinent six months. Further, there was no evidence that the mother sought to stay the order while her appeal was pending pursuant to N.C.G.S. § 7B-1003(a), or otherwise requested visitation with the child from the trial court or petitioner paternal grandparents.

**2. Termination of Parental Rights—best interests of child—termination at dispositional stage**

The trial court did not abuse its discretion in a termination of parental rights case by concluding that it was in a minor child's best interests to terminate respondent mother's parental rights at the dispositional stage of the proceeding under N.C.G.S. § 7B-1110(a) even though the mother alleged it would make the child a legal orphan. The child's paternal grandparents and legal custodians raised the child since he was eighteen months old and wished to adopt him, and termination of the mother's parental rights at this stage would facilitate this process.

Judge STROUD dissenting.

Appeal by Respondent-Mother from order and amended order entered 29 September 2016 and 10 October 2016 by Judge David V. Byrd in District Court, Wilkes County. Heard in the Court of Appeals 29 June 2017.

*Robert W. Ewing for Respondent-Appellant Mother.*

*Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for Petitioners-Appellees.*

McGEE, Chief Judge.

## I. *Background*

Respondent-Mother ("Mother") appeals from order and amended order terminating her parental rights as to the minor child, D.E.M., born in November 2011. We note the orders also terminated the parental rights of D.E.M.'s father ("Father"), who has not pursued an appeal. We affirm.

Petitioners are D.E.M.'s paternal grandparents. They were awarded primary legal and physical custody of D.E.M. in a civil custody order entered 14 November 2013. *See In re D.E.M.*, __ N.C. App. __, 782 S.E.2d 926, 2016 (unpublished). Although the custody order granted Mother and Father visitation with D.E.M., neither parent exercised their right to visitation after December 2013.

Petitioners filed a petition to terminate the parental rights of Mother and Father on 29 May 2014. *Id.* at ___, 782 S.E.2d at 926. After a hearing, the trial court concluded that Mother and Father had willfully abandoned D.E.M., *see* N.C. Gen. Stat. § 7B-1111(a)(7) (2015), and terminated their parental rights by order entered 4 March 2015. *D.E.M.*, ___ N.C. App. at ___, 782 S.E.2d at 926.

Mother appealed. In an opinion filed 1 March 2016, this Court vacated the termination order on the ground that Petitioners lacked standing to bring an action for termination of parental rights under N.C. Gen. Stat. § 7B-1103(a) (2015). *D.E.M.*, ___ N.C. App. at ___, 782 S.E.2d at 926.

Petitioners filed a new petition to terminate Mother's and Father's parental rights to D.E.M. on 8 March 2016. With regard to standing, the petition alleged that D.E.M. "has been in the sole custody of the Petitioners pursuant to an Order entered on November 14, 2013 in Wilkes County File No. 13 CVD 625."[1] Petitioners asserted three statutory grounds for termination of Mother's and Father's parental rights: (1) willful failure to pay for D.E.M.'s care, support, and education under N.C. Gen. Stat. § 7B-1111(a)(4); (2) dependency under N.C. Gen. Stat. § 7B-1111(a)(6); and (3) willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7).

The trial court held a hearing regarding the petition on 13 September 2016, receiving testimony from Petitioners and Mother and a written report from D.E.M.'s Guardian ad Litem ("GAL"). In its order terminating

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1. Although the petition mistakenly asserted standing under "N.C.G.S. § 7B-1103(a)(6)," we note that the statute confers standing upon "[a]ny person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion." N.C. Gen. Stat. § 7B-1103 (2015). The termination order cites to the correct statutory provision establishing Petitioners' standing.

the parental rights of Mother and Father,[2] the court adjudicated grounds for termination based on Mother's and Father's non-payment of support under N.C. Gen. Stat. § 7B-1111(a)(4) and willful abandonment of D.E.M. under N.C. Gen. Stat. § 7B-1111(a)(7). After considering the dispositional factors in N.C. Gen. Stat. § 7B-1110(a) and the recommendation of the GAL, the court further determined it was in D.E.M.'s best interest to terminate Mother's and Father's parental rights. Mother appeals. Father is not a party to this appeal.

## II. *Standard of Review*

The standard of review from an order terminating parental rights is well-established:

> Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. "In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B–1111(a)." This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." "It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony."

*In re C.J.H.*, 240 N.C. App. 489, 497–98, 772 S.E.2d 82, 88–89 (2015) (citations omitted).

> The trial court examined respondent's history of sporadic contact with the juvenile in evaluating whether his 2014 requests for visitation were made in good faith. Although the trial court must examine the relevant six-month period

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2. The record on appeal contains both the "Order Terminating Parental Rights" entered on 29 September 2016 and the "Amended Order Terminating Parental Rights" entered on 10 October 2016. Although Mother's notice of appeal is timely as to both orders, we deem the amended order to supersede the original. Accordingly, we confine our review to the "Amended Order Terminating Parental Rights" entered on 10 October 2016.

> in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions. *See . . . Gerhauser v. Van Bourgondien*, 238 N.C. App. 275, 291, 767 S.E.2d 378, 389 (2014) (considering a party's conduct after determinative date established . . . in order to assess "the party's credibility and intentions"). In light of the trial court's findings on respondent's history of sporadic contact with the juvenile, we hold that clear, cogent, and convincing evidence supports the trial court's sub-conclusions . . . that respondent failed to make a good faith effort to visit [the child].

*Id.* at 503, 772 S.E.2d at 91 (citations omitted).

> If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B–1110(a). The trial court's determination of the child's best interests is reviewed only for an abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

*In re S.Z.H.*, __ N.C. App. __, __, 785 S.E.2d 341, 345 (2016) (citation omitted). Uncontested findings of fact are deemed to be supported by the evidence and are binding on appeal. *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007).

## III. *Adjudication*

**[1]** Mother argues the trial court erred in adjudicating the existence of grounds to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(7). We disagree.

Mother challenges the trial court's conclusion that she willfully abandoned D.E.M. pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Under this provision, the trial court may terminate parental rights if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion [to terminate.]" N.C. Gen. Stat. § 7B-1111(a)(7) (2015). Petitioners filed their petition to terminate Mother's and Father's parental rights on 8 March 2016. Therefore, in reviewing the court's adjudication, we must primarily

consider Mother's conduct during the period from 8 September 2015 to 8 March 2016. "Although the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions." *C.J.H.*, 240 N.C. App. at 503, 772 S.E.2d at 91.

" 'Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.' " *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (citation omitted). " 'Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.' " *In re S.Z.H.*, __ N.C. App. at __, 785 S.E.2d at 347 (citation omitted). However,

> [a] judicial determination that a parent willfully abandoned her child, particularly when we are considering a relatively short six month period, needs to show more than a failure of the parent to live up to her obligations as a parent in an appropriate fashion; *the findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child.*

*Id.* (citation omitted).

In support of its adjudication under N.C. Gen. Stat. § 7B-1111(a)(7), the trial court made the following uncontested findings of fact:

> 4. In May 2013, [Mother and Father] were involved in a domestic violence incident. . . . [They] voluntarily placed the [D.E.M.] in the physical custody of [] Petitioners. [D.E.M.] has been in the exclusive custody of [] Petitioners since May 2013.
>
> 5. [Mother] sent a text to [] Petitioners on May 31, 2013 that indicated that she was going to harm herself. As a result of [Mother's] text, substance abuse on the part of both [Mother and Father], and the unstable relationship between [Mother and Father], [] Petitioners filed a custody action and obtained a temporary custody order for [D.E.M.].
>
> 6. Following a hearing on November 14, 2013, the Court granted [] Petitioners full legal and physical custody of [D.E.M.].

7. Prior to entry of the November 2013 Order, the Court had granted [Mother and Father] supervised visitation. Neither parent exercised any supervised visitation with [D.E.M.] from June 2013 through November 2013. . . . .

8. The November 2013 Order also granted [Mother and Father] visitation with [D.E.M.]. The visits were to be supervised by [] Petitioners for an initial sixty-day period. Thereafter the visits were to transition to unsupervised visitation.

9. [Mother] had one visit with [D.E.M.] on December 22, 2013. [She] did not feel comfortable with [] Petitioners' supervision and she did not pursue any further visits. *Neither [Mother nor Father] exercised any visitation whatsoever with [D.E.M.] after December 2013*, even though the visitation schedule was to transition to unsupervised visits within a reasonable period of time.

10. *Neither [Mother nor Father] has ever paid child support for the benefit of [D.E.M.] or offered any type of support for his case.* [Mother and Father] did send Christmas gifts to [D.E.M.] in 2014. Both [Mother and Father] have been gainfully employed and have had the ability to provide support for the benefit of [D.E.M.].

11. A prior termination of parental rights proceeding was filed against [Mother and Father] in 2014. The decision in the prior proceeding was vacated by the North Carolina Court of Appeals on March 1, 2016 . . . . *During the entire time that the prior action was pending, [Mother and Father] did not pursue any attempts to contact [D.E.M.].*

12. [] Mother saw [D.E.M.] and Petitioner [grandfather] at a grocery store in May 2015 and spoke to the child. It did not appear that [D.E.M.] knew her.

13. The Court previously found [Mother's] excuses for not attempting to visit with [D.E.M.] unpersuasive. [Her] reasons for not attempting to visit with [D.E.M.] are even less persuasive now given the passage of time.

The trial court also "found:"

15. [Mother's and Father's] conduct with respect to the minor child evinces a settled purpose to forego their

> parental duties. They have failed and refused to perform the natural and legal obligations of parental care and support and as such they have abandoned the minor child since he has been in Petitioners' care, custody and control.

Mother argues that Finding 15 is actually a conclusion of law, and also argues that even if it is considered to be a finding of fact, it is not supported by the record evidence. The trial court concluded that Petitioners had shown "by clear, cogent, and convincing evidence" that Mother and Father "have willfully abandoned" D.E.M. under N.C. Gen. Stat. § 7B-1111(a)(7).

Mother argues she cannot be deemed to have willfully abandoned D.E.M. during the six-month period from 8 September 2015 to 8 March 2016 because, until this Court vacated the order in its opinion filed in *In re D.E.M.* on 1 March 2016,[3] she was bound by the trial court's prior order terminating her parental rights. Mother notes that "the trial court did not grant [her] visitation during the pendency of the initial appeal in this case" or stay the termination order pending her appeal, as authorized by N.C. Gen. Stat. § 7B-1003. Mother contends that "[w]ithout an order from the trial court granting visitation pursuant to [N.C. Gen. Stat.] § 7B-1003 or an entry of a stay by the Courts, [her] failure to contact D.E.M. was not willful."

We find Mother's argument without merit. The evidence and the trial court's findings show that Mother made no effort to contact D.E.M. and paid nothing toward his support during the six months at issue in N.C.G.S. § 7B-1111(a)(7). While it is correct that the prior order terminating her parental rights remained in effect during this period, there is no evidence that Mother sought to stay the order while her appeal was pending pursuant to N.C.G.S. § 7B-1003(a), or otherwise requested visitation with D.E.M. from the trial court or Petitioners. *See* N.C. Gen. Stat. § 7B-1003(b) (2015). To the contrary, the evidence shows Mother made no attempt to have any form of contact with D.E.M. While Mother now suggests she "was *prohibited* from contacting and visiting D.E.M.," no such prohibition was imposed. (Emphasis added). Although Mother's options were limited after she was divested of her parental rights, she was not absolved of the requirement that she take whatever measures possible to show an interest in D.E.M. Regarding an incarcerated father, this Court had held: "Although his options for showing affection are greatly limited, the respondent will not be excused from showing

3. Our mandate to the trial court in *In re D.E.M.* issued 21 March 2016. *See* N.C. R. App. P. 32(b).

interest in the child's welfare by whatever means available. The sacrifices which parenthood often requires are not forfeited when the parent is in custody." *Whittington v. Hendren (In re Hendren)*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003). Similarly, in the present case, Mother had limited options to interact with D.E.M., yet she still failed to show that she even attempted to exercise any of the options available to her. Mother was not under any type of order restraining her from attempting to contact Petitioners about D.E.M., or sending gifts or letters to D.E.M. through Petitioners. Just as in *Hendren*, Mother's failure to even attempt to show affection for her child through her limited options was evidence that the child had been abandoned. *Hendren*, 156 N.C. App. at 369, 576 S.E.2d at 376-77.

In addition, "[a]lthough the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court *may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions*." *In re C.J.H.*, 240 N.C. App. at 503, 772 S.E.2d at 91 (citation omitted) (emphasis added). Mother has demonstrated almost no interest in D.E.M. since losing custody of him. This Court detailed Mother's lack of interest in its prior opinion in this matter:

> On 11 December 2013, following a hearing on the merits on 14 November 2013, the district court issued an order awarding petitioners primary legal and physical custody of [D.E.M.] As part of the court's custody order, [Mother] was granted the following visitation rights: "For the first sixty (60) days from the date of this hearing, [Mother] may have supervised visitation at [Petitioners'] home every other Sunday afternoon from 1:30 PM until 4:30 PM. If these visits go well and provided that there are no problems then for thirty (30) days after that [Mother] shall have unsupervised visitation with the minor child every other Sunday from 1:30 PM until 6:30 PM. Following that initial unsupervised period, and if those visits go well and provided that there are no problems, [Mother] shall have unsupervised overnight visitation every third weekend of the month from Friday at 6:00 PM until Sunday at 6:00 PM."
>
> On 29 May 2014, [P]etitioners filed a petition seeking the termination of [Mother]'s parental rights. Petitioners noted that at all times since [D.E.M.] was placed in their custody, [Mother] . . . knew the street address and phone number of their residence, yet [Mother] "only had contact

> with the child one time since November 14, 2013 and less than a handful of times in total since May, 2013." In addition, at the time the petition was filed, [P]etitioners had not heard from [Mother] since 22 December 2013, which was the only time she visited [D.E.M.] since [P]etitioners were awarded primary custody of him. [Mother has never] paid any support for [D.E.M.] or offered any assistance for his care.

*D.E.M.*, ___ N.C. App. ___, 782 S.E.2d 926. At the 13 September 2016 termination hearing, Petitioner-Grandmother testified:

> [T]hrough this whole period, from the time that we first went to court, [Mother and Father] have had visitations. When we first started going to court we communicated through [Petitioner's attorney] to have visitation. At one point, [Mother] wanted to have visitation at playgrounds. We agreed. We have agreed to everything that she requested. But she would never contact us to set up these visits. We never went to any playground. Like I said, she did not show up to Our House [a child abuse and neglect prevention organization], in town. She has come to the one visit [on 22 December 2013].

Petitioner-Grandmother testified that Mother has never contacted her requesting to set up visitation with D.E.M. since that single 22 December 2013 visit, and that Mother has never tried to contact her since a Facebook message Mother sent to Petitioner-Grandmother in February 2014. Petitioner-Grandmother testified that other than a few gifts Mother brought on her 22 December 2013 visit, she has not "sent any type of gifts, cards, correspondence, anything whatsoever," to D.E.M. Mother testified that though she has been continually employed since at least September 2013, she has never sent any money to help support D.E.M.

The trial court's findings show that Mother unilaterally ceased her court-ordered visitation with D.E.M. in December of 2013 *and made no further effort to preserve her relationship with D.E.M.* Viewed against this history, the evidence of Mother's ongoing failure to visit, contact, or provide for D.E.M. from 8 September 2015 to 8 March 2016 allows a reasonable inference that she acted willfully. *C.J.H.*, __ N.C. App. at __, 772 S.E.2d at 91; *see also Searle*, 82 N.C. App. at 276, 346 S.E.2d at 514 ("Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence."); *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) (Where "different inference[s] may be drawn from the evidence, [the trial court] alone

determines which inferences to draw and which to reject."). Having made no gesture to assist Petitioners with the support of D.E.M., or to provide D.E.M. with her "presence, love and care . . . by whatever means available," we hold that the trial court did not err in concluding that Mother abandoned D.E.M. within the meaning of N.C.G.S. § 7B-1111(a)(7). *In re R.R.*, 180 N.C. App. 628, 634, 638 S.E.2d 502, 506 (2006).

In light of our holding that grounds for termination exist under N.C. Gen. Stat. § 7B-1111(a)(7), we need not review the remaining ground found by the trial court under N.C.G.S. § 7B-1111(a)(4). *C.J.H.*, 240 N.C. App. at 504, 772 S.E.2d at 92 ("Because we hold that the findings of fact support one ground for termination, we need not review the other challenged grounds. *See Humphrey*, 156 N.C. App. at 540, 577 S.E.2d at 426–27.").

## IV. *Disposition*

**[2]** Mother next claims the trial court abused its discretion in concluding that it was in D.E.M.'s best interests to terminate her parental rights at the dispositional stage of the proceeding. *See* N.C. Gen. Stat. § 7B-1110(a) (2015). She argues the court made an erroneous assessment of D.E.M.'s best interests under N.C.G.S. § 7B-1110(a), based on its misunderstanding of North Carolina's adoption laws. We disagree.

"Once a trial court has concluded during the adjudication phase that grounds exist for termination of parental rights, it must decide in the disposition phase whether termination is in the best interests of the child." *In re D.R.F.*, 204 N.C. App. 138, 141, 693 S.E.2d 235, 238 (2010). The trial court's ruling on best interests will only be overturned pursuant to a showing that it abused its discretion. *S.Z.H.*, __ N.C. App. at __, 785 S.E.2d at 345. The trial court must consider and make findings about the following criteria, insofar as they are relevant:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a).

In assessing the likelihood of D.E.M.'s adoption under N.C.G.S. § 7B-1110(a)(2), the trial court found that "Petitioners have expressed their intentions to adopt [D.E.M.]." While Mother does not dispute the evidentiary support for this finding, she suggests that it "reflects [the court's] misapprehension of law" with regard to Petitioners' *ability* to adopt D.E.M. Specifically, she asserts that Petitioners lack standing to petition for D.E.M.'s adoption under N.C. Gen. Stat. § 48-2-301(a), which provides as follows:

> A prospective adoptive parent may file a petition for adoption pursuant to Article 3 of this Chapter only if a minor has been placed with the prospective adoptive parent pursuant to Part 2 of Article 3 of this Chapter unless the requirement of placement is waived by the court for cause.

N.C. Gen. Stat. § 48-2-301(a) (2015). Mother asserts that the 14 November 2013 custody order entered in 13 CVD 625 does not constitute an adoptive placement for purposes of Chapter 48 of our General Statutes. *See* N.C. Gen. Stat. § 48-1-101(13) (2015) (defining "[p]lacement"); *see also* N.C. Gen. Stat. § 48-3-201(a) (2015) (defining who may place a minor for adoption). Therefore, she contends that "termination of [her] parental rights would make D.E.M. a legal orphan which is not in his best interest."

We find Mother's argument unpersuasive. N.C. Gen. Stat. § 48-2-301(a) expressly authorizes a waiver of the requirement of an adoptive placement "for cause." N.C.G.S. § 48-2-301(a). The North Carolina Supreme Court has recognized a trial court's authority to waive the N.C.G.S. § 48-2-301(a) requirement. *In re Adoption of Byrd*, 354 N.C. 188, 191-92, 552 S.E.2d 142, 145 (2001) (where the trial court waived the prospective parent placement requirement for petitioners who filed to adopt a child the following day after the child's birth). Thus, it cannot be said Petitioners lack the ability to obtain standing to adopt D.E.M. Moreover, in the present case, Petitioners are D.E.M.'s grandparents and legal custodians; they have raised D.E.M. since he was eighteen months old; and they wish to adopt him. By all accounts, D.E.M. is thriving in Petitioners' home. D.E.M.'s GAL recommended the termination of Mother's and Father's parental rights in order to facilitate D.E.M.'s adoption by Petitioners. Under these circumstances, the court did not err in deeming it likely that Petitioners will adopt D.E.M. Nor did the court abuse its discretion in concluding that D.E.M.'s best interests would be served by terminating Mother's parental rights under N.C. Gen. Stat. § 7B-1110(a). Accordingly, we affirm the termination order.

AFFIRMED.

Judge ARROWOOD concurs.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

I respectfully dissent from the majority's opinion for two reasons. First, during the six month time period relevant to termination based upon willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7) (2015), Mother had no parental rights and no visitation rights under the previous Chapter 50 custody order. Second, the trial court erred by terminating Mother's parental rights based upon non-payment of child support under N.C. Gen. Stat. § 7B-1111(a)(4) (2015) because there was never any child support order entered requiring Mother to pay child support to Petitioners.

I. Abandonment

This case presents an unusual situation and appears to be a case of first impression. As the majority states, under N.C. Gen. Stat. § 7B-1111(a)(7), the trial court may terminate parental rights where "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" In this case, this Court filed a previous opinion on 1 March 2016 that vacated an earlier termination order due to lack of standing. *In re D.E.M.*, __ N.C. App. __, 782 S.E.2d 926, 2016 WL 791272, 2016 N.C. App. LEXIS 229 (2016) (unpublished). The new petition to terminate Mother's and Father's parental rights in the present case was then filed on 8 March 2016. Thus, during the entire six months next preceding the filing of the petition for termination, Mother's parental rights had been terminated and she had no right to visit with the child. The filing of the new petition, even before the prior termination order was officially vacated, set the beginning and ending dates of the new six-month period preceding the date of filing and also ended any practical possibility that Mother may take some legal action in the gap between the first termination order and the filing of a new petition to assert her visitation rights, because there was no gap. This was a clever procedural maneuver by Petitioners' counsel, at a time when Mother had no legal representation. After the new petition was filed and counsel was appointed for her, it was too late.

Although Mother had been awarded some limited visitation rights in the prior Chapter 50 custody proceeding, the prior termination order

ended those rights. At the hearing in September 2016, Mother described her attempts to exercise her visitation before her rights were terminated and claimed that Petitioners always had some sort of excuse for her not to visit. For example, they did not want her to bring her other child to her visitation with D.E.M., although the custody order did not include this limitation and her other child is D.E.M.'s half-brother. Petitioner Grandmother acknowledged that she had imposed this limitation although the order did not require it. Mother testified that since May of 2015, she had been unable to contact respondents. She never had a home phone number for Petitioners. Petitioner Grandmother acknowledged that she had changed her cell phone number about a year before the hearing, although she said that Petitioner Grandfather's number had not changed. But Mother testified that when she called Petitioner Grandfather's number in November 2015, a woman answered and told her it was not the correct number. She had been blocked from contacting Petitioner Grandmother on Facebook. Petitioners did not claim to have made any efforts to encourage Mother to have a relationship with D.E.M. or even to let her know how the child was doing. Mother felt that she was not welcome at Petitioners' home, and since they lived down a mile-long dirt road, she feared they would charge her with harassment if she tried to approach the house. She also testified: "I've been threatened that I wasn't welcome up there. They have guns."

On cross-examination, Petitioners' counsel stressed the fact that Mother had visitation rights under the custody order and that she had not filed an action for contempt to enforce those rights. Mother acknowledged this was true, as she had been unable to afford to pay an attorney. In closing, Petitioners' counsel stressed that Mother had not sought to see the child and acknowledged that during the relevant six months, her rights had been terminated. But he argued that the prior termination order should not change the court's analysis:

> The Court of Appeals vacated the earlier decision. What does all that mean for [Mother]? That's more time. It's more time for her to try to come back to court and try to say I've got a custody order. I've got an order that says I get to see my son on certain specified dates. And I want to do that. . . .
>
> And the most telling thing in this case is she didn't do anything.

The trial court also noted that Mother had visitation rights under the custody order. But Petitioners' argument and the trial court's reliance

on the custody order for the relevant six month period was legally incorrect. Mother did not have a custody order or any visitation rights after 4 March 2015, when her parental rights were terminated by the trial court's first order, and since the new termination proceeding was filed on 8 March 2016 before the mandate issued on this Court's opinion in *In re D.E.M.*, __ N.C. App. __, 782 S.E.2d 926, 2016 WL 791272, 2016 N.C. App. LEXIS 229, she never could have had any opportunity legally to assert her rights during the relevant time, even if she had been able to afford an attorney.

I agree with the majority that it is appropriate for the trial court to consider a parent's conduct outside the relevant six months next preceding the filing of the petition "in evaluating respondent's credibility and intentions." *In re C.J.H.*, 240 N.C. App. 489, 503, 772 S.E.2d 82, 91 (2015). But in *In re C.J.H.*, the father was under no legal or physical restraint or disability which could prevent him from seeing the child; the court was evaluating his "sporadic" efforts to have contact with the child over a period of several years, where he had made a few attempts during the relevant six month period. *Id.* at 500-03, 772 S.E.2d at 90-91. The law does not support relying *solely* upon a time period prior to the six months preceding the filing of the petition for a finding of abandonment. Efforts to see a child outside of the relevant six-month period were considered only to evaluate the "credibility and intentions" of the parent *during* the six month period. Events outside the relevant six month period cannot be the sole basis for the termination, where the parent was legally not a parent and had no rights to assert during the relevant time. I would therefore reverse the trial court's determination that Mother willfully abandoned the child under N.C. Gen. Stat. § 7B-1111(a)(7).

II. Failure to pay child support

The other ground the trial court relied upon to terminate Mother's right was failure to pay any child support under N.C. Gen. Stat. § 7B-1111(a)(4). Although a child support order is not necessary for the trial court to terminate a parent's rights under N.C. Gen. Stat. § 7B-1111(a)(3) (2015), when a child "has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home," a child support order is necessary in this situation, where the child was in the legal custody of Petitioners, his grandparents. The trial court relied here upon N.C. Gen. Stat. § 7B-1111(a)(4), which allows termination of parental rights when:

> *One parent* has been awarded custody of the juvenile by judicial decree or has custody by agreement of the

> parents, and the *other parent* whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by said decree or custody agreement.

(Emphasis added)

First, it is not clear that subsection (4) would apply here since neither parent was awarded custody of the child; the grandparents were awarded custody. But even if this subsection does apply to a case in which a non-parent has custody, it is undisputed that no child support order was ever entered. Petitioners testified that they had included a claim for child support in the custody complaint but acknowledged that no order was ever entered on child support.[1] The trial court erred in terminating Mother's parental rights on this basis.

These were the only two bases for termination of parental rights the trial court found, and considering the evidence before the court, that is not surprising. The other unusual thing about this case is that the record does not reveal that Mother -- or Father, although he did not appeal -- is unfit as a parent in any way. Mother and Father, though never married, had been living together since January 2015 and continued to do so at the time of the hearing in September 2016. Mother's child from a prior relationship and their youngest child, D.E.M.'s full brother, live with them. She testified regarding the medical care she provided for both children and her older child's education. Although Mother had some periods of instability in relation to her residence several years ago, at the time of the termination hearing, she and Father shared a home and there was no evidence to indicate it is not suitable for children. Both parents were employed. Mother had a driver's license, insurance, and transportation. The only evidence of domestic violence between the parents was the incident in May 2013 which led to Petitioners' assumption of custody of D.E.M. Mother testified that they now "get along better than we've ever gotten along." Petitioner Grandmother had suspicions of drug use by Mother and Father back in 2013; Mother had submitted to three drug tests under an order in the custody case and passed all three. There was no evidence of any suspicion of drug use since 2013. All of this evidence was uncontroverted.

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1. If Petitioners had pursued entry of an order for child support in the Chapter 50 case, it would have imposed an obligation on Father – their son – as well as Mother. The evidence showed that Petitioners also allowed Father to see D.E.M., although he did so infrequently.

I agree that there were other methods Mother could have, and should have, used to enforce her rights to D.E.M. since 2014. Those methods all require representation by counsel, which Mother could not afford. She could have used other methods to contact Petitioners to seek to exercise her visitation -- when the custody order was still in effect, at least. The trial court evaluated her "excuses" as unpersuasive, and that is the role of the trial court. But because Mother had no legal rights during the relevant six-month period, as a matter of law, her rights cannot be terminated based upon her failure to assert them during that time.

Since I would therefore reverse the trial court's order adjudicating the existence of grounds to terminate Mother's parental rights, I dissent.

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IN THE MATTER OF STEPHEN WOLFE

No. COA16-1217

Filed 18 July 2017

**Mental Illness—voluntary admission to inpatient psychiatric facility—inpatient treatment—written and signed application by guardian required**

The trial court lacked jurisdiction to concur in respondent adult incompetent's voluntary admission to a twenty-four hour inpatient psychiatric facility and to order that he remain admitted for further inpatient treatment. The hearing was not indicated by a written and signed application for voluntary admission by a guardian as required by N.C.G.S. § 122C-232(b).

Appeal by respondent from order entered 9 June 2016 by Judge Andrea Dray in Buncombe County District Court. Heard in the Court of Appeals 3 May 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for petitioner-appellee.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for respondent-appellant.*

ELMORE, Judge.

**IN RE WOLFE**

[254 N.C. App. 416 (2017)]

Respondent Stephen Wolfe, an adult incompetent, appeals from an order concurring in his voluntary admission to a twenty-four hour (inpatient) psychiatric facility and ordering he remain admitted for further inpatient treatment. Wolfe contends the trial court lacked subject-matter jurisdiction to enter its order because it never received his written and signed application for voluntary admission to the facility as statutorily required to initiate the postadmission review hearing from which its order arose. Because we hold the lack of a written and signed application for voluntary admission fails to vest a district court's subject-matter jurisdiction to concur in a patient's voluntary admission and order continued admission for further treatment, we vacate the court's order.

## *I. Background*

On 25 May 2016, Wolfe presented to the emergency department at Mission Hospital in Buncombe County "suffering from self-reported dehydration, and apparent psychiatric decompensation due to treatment noncompliance." Three days later Wolfe was admitted to Mission Hospital's inpatient psychiatric unit (Copestone) and evaluated that same day by a staff psychiatrist, Dr. Suzanne Collier.

On 31 May, Dr. Collier filed with the Buncombe County District Court an evaluation for admission, in which she noted that Wolfe had a history of bipolar disorder and psychiatric hospitalizations; that he had recently stopped taking his psychiatric medication and was exhibiting signs of paranoia, delusions, and sleeplessness; and opined that Wolfe was mentally ill, needed further evaluation, and should be admitted to Copestone for inpatient psychiatric treatment. Upon receipt of Dr. Collier's evaluation, the district court scheduled an "Involuntary Commitment or Voluntary Admission hearing" to review Wolfe's admission and determine if further inpatient psychiatric treatment was necessary. The district court never received a written and signed application for Wolfe's voluntary admission to Mission Hospital or to its psychiatric unit at Copestone.

On 3 June, Wolfe was appointed counsel. After interviewing Wolfe, his appointed counsel filed a notice with the district court requesting a hearing because Wolfe "does not agree with [Dr. Collier's] recommendations."

At the 9 June hearing on Wolfe's admission, Dr. Collier testified that Wolfe "did not present [to the emergency room] for psychiatric reasons per his report" and stated when she first evaluated Wolfe on 28 May, "he told me he came in for some other medical problem, and that he didn't need to be at Copestone." Dr. Collier stated that Wolfe was admitted to

the hospital's psychiatric unit because he had stopped taking his bipolar disorder medications; was currently in a manic episode; and was decompensating, experiencing symptoms of agitation, paranoia, delusions, and sleeplessness. After about a week of observation, Dr. Collier explained that Wolfe "generally remained calm, but argumentative about the fact that he [did not] believe he need[ed] to be on medication." Wolfe initially refused to take the oral psychiatric medication prescribed at Copestone because he believed it was unnecessary and was "poisoning him." After a few forced antipsychotic injections to which Wolfe's guardian apparently consented, Wolfe started voluntarily taking his oral medication a few days before the hearing. Dr. Collier opined that Wolfe needed further inpatient treatment to stabilize him on his current medication and expressed concern that if he were released, Wolfe might stop taking his medication, decompensate, and become manic. She opined further that it would currently be medically inappropriate to discharge Wolfe to an independent living situation and requested that the court authorize his continued inpatient psychiatric treatment at Copestone for thirty more days.

Wolfe testified that he presented to Mission Hospital's emergency department complaining of severe dehydration and malnourishment because he was unable to pay for groceries, since his payee, who receives government benefits on his behalf, failed to provide him funds timely for basic living expenses. Wolfe conceded that he did not believe he has bipolar disorder and stated he initially refused medication at Copestone because each of the seven or eight psychiatric medications he has been prescribed over the past several years have "poison[ed the] emotional state of being in [his] state of mind" and have "made [him] angry, irritable, and stupid." Wolfe testified that he was currently receiving outpatient treatment at Family Preservation Services and taking psychiatric medication as needed, as prescribed by a general psychiatrist there. Wolfe indicated he would continue taking the medicine prescribed at Copestone if discharged and was currently able to return to living independently. Wolfe requested that if the court found it necessary he receive further inpatient treatment, it send him to another facility for an independent assessment, since Copestone "seem[ed] to be intent on making [him] take [bipolar] medicine and stay there." Wolfe's guardian was not present at the hearing.

After the hearing, the court entered an order on 9 June 2016 concurring in Wolfe's voluntary admission and authorizing his continued inpatient admission at Copestone for no more than thirty days. In its order, the court found by clear, cogent, and convincing evidence that Wolfe was mentally ill, in need of further treatment at Copestone, and

that lesser measures would be insufficient. Wolfe was discharged from Copestone on 22 June 2016. Wolfe appeals.

### *II. Analysis*

On appeal, Wolfe contends the trial court lacked jurisdiction to concur in his voluntary admission and order he remain admitted for further inpatient psychiatric treatment because it never received a written and signed application for his voluntary admission to Copestone as required by N.C. Gen. Stat. § 122C-232 to initiate the hearing. Wolfe also challenges the sufficiency of evidence underlying the district court's finding that his admission was voluntary, arguing no evidence presented showed that his admission to Mission Hospital's inpatient psychiatric unit at Copestone was, in fact, voluntary. Because we hold that the lack of Wolfe's application for voluntary admission failed to vest the trial court with subject-matter jurisdiction to concur in his admission and authorize he remain admitted for additional inpatient treatment, we vacate the order and thus decline to address Wolfe's second argument.

We review *de novo* whether a trial court has jurisdiction over particular subject matter. *See, e.g.*, *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). Subject-matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130, *disc. rev. denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity," *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (citing *High v. Pearce*, 220 N.C. App. 266, 271, 17 S.E.2d 108, 112 (1941)), and "in its absence a court has no power to act[ and any resulting] 'judgment is void,' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956)). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to . . . vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (citations omitted).

" 'Where jurisdiction is statutory and the [l]egislature requires the [c]ourt to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction.' " *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds*

*by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)). Thus, for certain statutorily created causes of action, a trial court's subject-matter jurisdiction over the action does not fully vest unless the action is properly initiated. *In re T.R.P.*, 360 N.C. at 591–93, 636 S.E.2d at 790–92 (holding court lacked jurisdiction to enter a custody review order in an abuse, neglect, and dependency action because statutorily required initiating petition was defective); *see also Hodges v. Hodges*, 226 N.C. 570–71, 571, 39 S.E.2d 596, 597 (1946) (holding court lacked jurisdiction to enter order in alimony action because statutorily required initiating complaint was defective). This principle also applies to statutorily created involuntary commitment proceedings and a court's authority to enter an involuntary commitment order. *See In re Ingram*, 74 N.C. App. 579, 580–81, 328 S.E.2d 588, 589 (1985) (vacating commitment order for want of jurisdiction where initiating petition lacked statutorily required affidavit).

Article 5 of Chapter 122C of the North Carolina General Statutes governs the procedures for admitting or committing persons into inpatient psychiatric facilities. N.C. Gen. Stat. § 122C-211(a) (2015) provides that for a competent adult to seek voluntary admission to a facility, "a written application for evaluation or admission, signed by the individual seeking admission, is required." For incompetent adults seeking voluntary admission, the written application must be completed and signed by his or her guardian. *Id.* § 122C-231 ("The provisions of G.S. 122C-211 shall apply to admissions of an incompetent adult . . . except that the legally responsible person shall act for the individual, in applying for admission to a facility . . . ."); *id.* § 122C-3(20) (" 'Legally responsible person' means . . . when applied to an adult, who has been adjudicated incompetent, a guardian . . . ."). Accordingly, for Wolfe to have been voluntarily admitted to Copestone, his guardian was required to complete and sign a written application for Wolfe's admission.

N.C. Gen. Stat. § 112C-232 (2015) empowers a district court to review an incompetent adult's voluntary admission into an inpatient psychiatric facility and order he or she remain admitted for further inpatient treatment. The statute mandates that the district court must hold a hearing within ten days after an incompetent adult's voluntary admission to "determine whether the incompetent adult is mentally ill . . . and is in need of further treatment at the facility." *Id.* §§ 122C-232(a), (b). If the court determines by clear, cogent, and convincing evidence that the patient is mentally ill, in need of further treatment, and that lesser measures would be insufficient, the court may concur with the voluntary admission and authorize further treatment. *Id.* § 122C-232(b). If further inpatient treatment is authorized, "only the facility or the court may

release the incompetent adult" upon a determination that such treatment is no longer needed. *Id.* § 122C-233(b).[1]

Significantly here, N.C. Gen. Stat. § 112C-232(b) provides that "[i]n any case requiring [this] hearing . . . , no petition is necessary; *the written application for voluntary admission shall serve as the initiating document* for the hearing." (Emphasis added.) This limitation conditions subject-matter jurisdiction: a district court's N.C. Gen. Stat. § 122C-232 jurisdiction to concur in an incompetent adult's voluntary admission and order that he or she remain admitted for further inpatient treatment does not vest absent the statutorily required written application for voluntary admission signed by the incompetent adult's legal guardian.

Here, the district court entered an order purporting to concur in Wolfe's voluntary admission to Copestone and ordering he remain admitted for an additional thirty days of inpatient psychiatric treatment. Yet the appellate record contains no written application for Wolfe's voluntary admission signed by his guardian. Rather, as an amendment to appellate record reflects, Wolfe's "application was not filed in the court file for this case," and the Buncombe County District Court calendared the hearing upon receipt of Dr. Collier's evaluation for admission. Because a written and signed application for voluntary admission never initiated the hearing, the district court failed to comply with the requirements of N.C. Gen. Stat. § 122C-232(b). Because the district court never received this required application for voluntary admission, its subject-matter jurisdiction to concur in Wolfe's voluntary admission to Copestone and order he remain admitted for further inpatient psychiatric treatment never vested. The district court thus lacked authority to enter its voluntary admission order and it must be vacated. *See In re Ingram*, 74 N.C. App. at 580–81, 328 S.E.2d at 589 (vacating commitment order for want of jurisdiction where petition to initiate involuntary commitment proceedings lacked statutorily required affidavit); *cf. In re T.R.P.*, 360 N.C. at 591–93, 636 S.E.2d at 790–92 (affirming this Court's decision to vacate a custody review order because lower court's subject-matter jurisdiction never vested where initiating petition lacked statutorily required verification).

### *III. Conclusion*

The lack of a required written application for Wolfe's voluntary admission signed by his guardian failed to vest the district court with

1. Additionally, if the facility refuses a legal guardian's request to discharge an incompetent adult, the guardian may apply to the court for a discharge hearing. *Id.*

subject-matter jurisdiction to concur in his voluntary admission to Copestone and order he remain admitted for further inpatient treatment. We therefore vacate its voluntary admission order.

VACATED.

Judges INMAN and BERGER concur.

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RICHMOND COUNTY BOARD OF EDUCATION, PLAINTIFF

v.

JANET COWELL, NORTH CAROLINA STATE TREASURER, IN HER OFFICIAL CAPACITY; LINDA COMBS, NORTH CAROLINA STATE CONTROLLER, IN HIS OFFICIAL CAPACITY; ANDREW HEATH, NORTH CAROLINA STATE BUDGET DIRECTOR, IN HIS OFFICIAL CAPACITY; FRANK PERRY, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, IN HIS OFFICIAL CAPACITY; AND ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA17-112

Filed 18 July 2017

**Penalties, Fines, and Forfeitures—fees collected—improperly sent to jail program instead of schools—money already spent—judicial branch not authorized to order new money paid from treasury—failure to secure injunction**

The trial court erred by its order and writ of mandamus commanding defendants (State Treasurer, State Controller, and various other officials) to pay money from the State treasury to satisfy a court judgment against the State for all fees collected and sent to a jail program to be "paid back" to the clerks of superior court in the respective counties, to then be sent to the county schools. Under longstanding precedent from our Supreme Court, the judicial branch cannot order the State to pay new money from the treasury to satisfy this judgment where the fees collected through the program were already spent to assist the counties in funding their local jails and plaintiff Board of Education never secured an injunction to stop the program while this case made its way through the courts.

Appeal by defendants from order entered 1 November 2016 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 June 2017.

*George E. Crump, III, for plaintiff-appellee.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Thomas M. Woodward and Special Deputy Attorney General Amar Majmundar, for defendants-appellants.*

DIETZ, Judge.

The State Treasurer, State Controller, and various other officials appeal from the trial court's order and writ of mandamus commanding them to pay money from the State treasury to satisfy a court judgment against the State.

If this were any other case, we would summarily reverse. Under the Separation of Powers Clause in our State constitution, no court has the power to order the legislature to appropriate funds or to order the executive branch to pay out money that has not been appropriated.

But this case is more complicated because it, too, arises under our State constitution. The Richmond County Board of Education brought a claim against the State alleging that fees collected for certain criminal offenses, and used to fund county jail programs, should have been given to the schools instead. The school board relied on Article IX, Section 7 of our State constitution, which provides that "all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools."

After a series of appeals to this Court, the school board ultimately prevailed on its constitutional claim. This Court ordered that all fees collected and sent to the jail program must be "paid back" to the clerks of superior court in the respective counties, to then be sent to the county schools. *Richmond Cty. Bd. of Educ. v. Cowell*, __ N.C. App. __, __, 776 S.E.2d 244, 249 (2015).

That never happened—apparently because the Richmond County Board of Education never secured an injunction to stop the program while this case made its way through the courts, and now the money has been spent. Moreover, the General Assembly, to date, has not appropriated any new money to pay the Richmond County schools (or any other county schools) what they are owed.

After time passed and the Richmond County schools never got paid, the school board returned to the trial court and secured the order and

writ of mandamus on appeal here, which commands various state officials to immediately pay the judgment out of the State treasury or risk being thrown in jail.

As explained below, we reverse the trial court's order. Under longstanding precedent from our Supreme Court, the judicial branch cannot order the State to pay new money from the treasury to satisfy this judgment. To be sure, if the school board had sought and obtained an injunction to stop the county jail program from using the money, courts might have the power to order the existing money returned. But that is not what happened here. The fees collected through the program are gone—spent to assist the counties in funding their local jails.

Of course, this does not mean the Richmond County schools cannot get their money. As our Supreme Court explained in a similar case, having entered a money judgment against the State, the judiciary has "performed its function to the limit of its constitutional powers." *Smith v. State*, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976). From here, satisfaction of that money judgment "will depend upon the manner in which the General Assembly discharges its constitutional duties." *Id.*

**Facts and Procedural History**

On 16 February 2012, the Richmond County Board of Education sued various State officials challenging the constitutionality of a now-repealed version of N.C. Gen. Stat. § 7A-304(a)(4b). The statute required the State to collect a $50 fee from defendants convicted of improper equipment offenses and to remit the $50 fee to the Statewide Misdemeanant Confinement Fund, which helps counties pay the cost of housing criminal offenders in county jails, rather than in State prisons. The school board argued that the statute violated Article IX, Section 7 of the North Carolina Constitution, which states that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art. IX, § 7(a).

After a side trip to this Court on the issue of sovereign immunity, *Richmond Cty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 739 S.E.2d 566, *rev. denied*, 367 N.C. 215, 747 S.E.2d 553 (2013), the trial court granted summary judgment in the school board's favor.

On appeal from the trial court's judgment, this Court affirmed, holding that "the remittance of the $50.00 surcharges collected in Richmond

County to the State Confinement Fund is unconstitutional" and "it is appropriate—as the trial court ordered—that this money be paid back to the clerk's office in Richmond County" to then be paid to the school system as the State constitution requires. *Richmond Cty. Bd. of Educ. v. Cowell*, __ N.C. App. __, __, 776 S.E.2d 244, 249 (2015). Neither side sought further review of this Court's decision in our Supreme Court. On remand, the trial court followed this Court's mandate and entered a judgment ordering the State to pay the Richmond County school system the $272,300.00 it is owed.

Time passed but the Richmond County schools never got the money. Apparently, the State was unable to "pay back" the funds collected from the $50 fees, as this Court had ruled, because the money already had been spent on the county jail program. Thus, without a new appropriation from the General Assembly, there were no funds available to satisfy the judgment.

The school board ultimately returned to the trial court and sought an order directing various State officials to appear and show cause why they had not complied with the trial court's judgment. The court initially denied the school board's request without prejudice, noting that "Plaintiff's Motion for Show Cause Order raises significant issues concerning appropriation of state funds, matters of collectability, and separation of powers." The trial court also observed that a legislative session was set to begin, at which point the General Assembly could appropriate funds to pay the judgment.

That didn't happen. The General Assembly concluded its legislative session without appropriating any funds to satisfy the judgment. On 1 September 2016, the Richmond County Board of Education returned to the trial court seeking an order to compel various State officials to pay $272,300.00 out of the State treasury to satisfy the trial court's judgment. The trial court granted the school board's motion and issued a writ of mandamus ordering the State Treasurer, State Controller, and State Attorney General to take the necessary steps to pay the judgment using funds from the State treasury. This appeal followed.

**Analysis**

Among the most important rights guaranteed in the North Carolina Constitution is the Separation of Powers, which ensures that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. The Framers of our constitution included this provision

in the Declaration of Rights to prevent the concentration of power in any one branch of our government. By reserving certain powers exclusively to one of the three branches, our government has an inherent set of checks and balances, which the Framers believed was essential to preserve liberty and prevent tyranny. *See State v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016). This is not a controversial concept. As our Supreme Court once observed, "[a]s to the wisdom of this provision there is practically no divergence of opinion—it is the rock upon which rests the fabric of our government." *Person v. Board of State Tax Comm'rs*, 184 N.C. 499, 502, 115 S.E. 336, 339 (1922).

Although most Separation of Powers cases (in modern times, at least) involve clashes between the legislative and executive branches, in many ways the judicial branch poses the greatest risk to the doctrine. This is so because the courts have an inherent power "to do all things that are reasonably necessary for the proper administration of justice." *In re Alamance Cty. Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991). To accomplish this task, courts possess the power to issue injunctions and extraordinary writs, like the writ of mandamus issued in this case. If the public officials targeted by these injunctions and writs ignore them, those officials can be held in contempt and put in jail. Left unchecked, this power would permit judges to freely organize and execute State power as they see fit.

To restrain this far-reaching power, our Supreme Court repeatedly has acknowledged that "[e]ven in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body." *Id.* at 99, 405 S.E.2d at 132. In other words, the Separation of Powers doctrine prohibits the courts from using the judicial power to step into the shoes of the other branches of government. The courts can declare a statute unconstitutional, for example, but cannot draft a new one or order the legislature to do so. *Person*, 184 N.C. at 503, 115 S.E. at 339.

Unsurprisingly, fights over the reach of judicial power often arise in the context of the State treasury. After all, courts expect that when they enter valid money judgments against the State, the State will respect those judgments. But, when that fails, the Separation of Powers clause prevents the judicial branch from reaching into the public purse on its own. Appropriating money from the State treasury is a power vested exclusively in the legislative branch and "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law." N.C. Const. art. V, § 7; *see also Advisory Opinion In re Separation*

*of Powers*, 305 N.C. 767, 777, 295 S.E.2d 589, 595 (1982). Because the State constitution vests the authority to appropriate money solely in the legislative branch, the Separation of Powers Clause "prohibits the judiciary from taking public monies without statutory authorization." *Alamance Cty. Court Facilities*, 329 N.C. at 99, 405 S.E.2d at 132.[1]

Our Supreme Court described how these Separation of Powers principles apply in *Smith v. State*, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976). In *Smith*, the Supreme Court held that when the State contracts with a private citizen, it cannot invoke sovereign immunity to defeat an action alleging that the State breached that contract. The Court likewise reaffirmed the power of the judicial branch to enter a money judgment against the State. But the Court also cautioned that the power of the judicial branch ends with the entry of that judgment:

> In the event that plaintiff is successful in establishing his claim against the State, he cannot, of course, obtain execution to enforce the judgment. The validity of his claim, however, will have been judicially ascertained. The judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties.

*Id.* (citations omitted).

Thus, when the courts enter a judgment against the State, and no funds already are available to satisfy that judgment, the judicial branch has no power to order State officials to draw money from the State treasury to satisfy it.

Of course, this case is no mere contract dispute. The State violated the North Carolina Constitution when it moved money otherwise destined for the Richmond County schools to a separate State fund to pay for county jail programs throughout the State. *Richmond Cty. Bd. of Educ. v. Cowell*, __ N.C. App. __, __, 776 S.E.2d 244, 249 (2015). As a result, this Court held that "it is appropriate—as the trial court ordered—that this money be paid back to the clerk's office in Richmond County." *Id.*

It was well within the judicial branch's power to order this money—taken from Richmond County in violation of the constitution—to be

1. The only exception to this rule is when the legislative branch refuses to fund the judicial branch to such an extreme extent that the judiciary cannot perform its own constitutional duties. *Alamance Cty. Court Facilities*, 329 N.C. at 99, 405 S.E.2d at 132.

returned. This, in turn, means that if the money collected from these fines still rested within the Statewide Misdemeanant Confinement Fund, awaiting the outcome of this protracted litigation, the courts could order State officials to return the money to Richmond County and the other affected counties.

But, as the parties concede, this cannot be done because the money is gone. The Richmond County Board of Education did not obtain a preliminary injunction to prevent the State from spending the money while it litigated the case (and the record on appeal contains no indication that the school board even sought an injunction). As a result, the only way the State can satisfy the judgment entered by the trial court is to pay *new* money from the State treasury—money not obtained from the improper equipment fees, but from the taxpayers and other sources of general State revenue. Under *Smith*, the judicial branch lacks the power to order State officials to pay this new money from the treasury. 289 N.C. at 321, 222 S.E.2d at 424.

The school board also contends that, even without a specific appropriation from the General Assembly, there are ways for State officials to find money to pay the judgment. For example, the school board points to the Contingency and Emergency Fund established in N.C. Gen. Stat. § 143C-4-4. By law, that fund may be used for "expenditures required . . . by a court." N.C. Gen. Stat. § 143C-4-4. The school board argues that the trial court's writ of mandamus can be interpreted not as an order to pay out funds that were not appropriated, but instead as an order that State officials take whatever steps are necessary to pay the judgment from any discretionary sources that are available.

We must reject this argument because a writ of mandamus may be used only to command public officials "to perform a purely ministerial duty imposed by law; it generally may not be invoked to review or control the acts of public officers respecting discretionary matters." *Alamance Cty. Court Facilities*, 329 N.C. at 104, 405 S.E.2d at 135. It is hard to imagine a more discretionary process than the one required to obtain emergency funds—a process that permits State agencies to request the funds, then permits the Governor to decide whether to approve that request, and then calls for the Council of State to review the agency's request and the Governor's recommendation, and to vote on whether to approve it. N.C. Gen. Stat. § 143C-4-4.[2]

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2. In addition, although portions of the trial court's order refer to all defendants in the suit, the writ of mandamus is directed only at the State Treasurer, State Controller, and State Attorney General, not at the other officials involved in this process.

Moreover, commanding members of the Council of State and other executive branch officials to approve payment from this type of discretionary emergency fund is no less offensive to the Separation of Powers Clause than commanding the legislature to appropriate the money. *See Alamance Cty. Court Facilities*, 329 N.C. at 100, 405 S.E.2d at 133. The Contingency and Emergency fund, as its name suggests, was created to fund "contingencies and emergencies" for which no separate appropriation exists but which must be addressed before the General Assembly convenes to appropriate new funds. Determining what constitutes an emergency worthy of this special fund is a task for which executive branch officials are uniquely suited. The judiciary "has no power, and is not capable if it had the power" of substituting its own judgment for that of the executive branch officials charged with making these discretionary decisions. *Id.* at 101, 405 S.E.2d at 134.

In sum, the role of the courts in this constitutional dispute is over. As the Framers of our constitution intended, the judiciary "performed its function to the limit of its constitutional powers" by entering a judgment against the State and in favor of the Richmond County Board of Education. *Smith*, 289 N.C. at 321, 222 S.E.2d at 424. The State must honor that judgment. But it is now up to the legislative and executive branches, in the discharge of their constitutional duties, to do so. The Separation of Powers Clause prevents the courts from stepping into the shoes of the other branches of government and assuming their constitutional duties. We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box.

**Conclusion**

For the reasons discussed above, we reverse the trial court's order and writ of mandamus.

REVERSED.

Judges ELMORE and ARROWOOD concur.

**SLAUGHTER v. SLAUGHTER**

[254 N.C. App. 430 (2017)]

MARTIN T. SLAUGHTER, PLAINTIFF
v.
NICOLE B. SLAUGHTER, DEFENDANT

No. COA16-1153

Filed 18 July 2017

**1. Divorce—equitable distribution—valuation of law practices—sufficiency of findings of fact—sufficiency of conclusions of law**

The trial court did not err in an equitable distribution order by considering and relying upon the report of a valuation expert appointed by the court on the valuation of the husband's law practices. Although the trial court did not consider the computational factors the husband favored, calculation of those specific factors was not necessary.

**2. Divorce—equitable distribution—value of law practices—findings**

The trial court did not err by not making certain findings about the valuation of law practices that the husband argued were required and did not err in its subsequent distribution of the divisible portion of the law practices.

**3. Divorce—equitable distribution—marital shares—active and passive appreciation**

The trial court did not err in an equitable distribution action in its distribution of the appreciation in a company in which plaintiff and defendant owned shares. The trial court relied on the report of an expert in valuations in classifying the appreciation that resulted from marital efforts as active and the appreciation attributable to inflation and "other" as passive.

**4. Divorce—equitable distribution—distributive award—means to pay**

The trial court did not err in an equitable distribution action by finding that the husband had the means to pay a distributive award. The husband did not challenge a finding that he had two sources of income from his law practices, the ability to unilaterally obtain liquid distributions from a company, and the ability and willingness to use the company credit card to pay personal expenses.

**5. Attorney Fees—alimony—affidavits—reasonableness**

The trial court did not abuse its discretion in an alimony order in its award of attorney fees. Although plaintiff husband contended that the wife's affidavits regarding the attorney fees did not differentiate between fees owed for child support, post-separation support, or alimony, the affidavits were admitted without objection, and thus, formed a sufficient basis for the trial court to recognize the amounts charged.

**6. Costs—expert fees—court-appointed expert—prior court order required**

The trial court erred in an alimony order by awarding expert witness costs. The costs of an expert may be awarded only for testimony given, except that the costs of a court-appointed expert are not subject to that limitation. Contrary to the wife's contention that her expert in forensic accounting became a court-appointed expert since he was used by the court and the husband did not have an expert in this area, there was no prior court order appointing an expert that would place the parties on notice that the expert might be considered court-appointed pursuant to N.C.G.S. § 8C-1, Rule 706.

**7. Appeal and Error—timeliness of appeal—cross-appeal—issue of first impression**

The trial court erred by denying a husband's motion to dismiss a wife's child support appeal where the husband only appealed the equitable distribution and alimony orders. The wife was limited to the addressing only those orders the husband addressed in his appeal because her challenge to the child support order was not timely.

**8. Divorce—equitable distribution—transfer of ownership—limited liability company**

Although defendant wife contended that the trial court erred in an equitable distribution order by failing to recognize that it had the legal authority to transfer her ownership interest in a limited liability company to defendant husband, the Court of Appeals declined to instruct the trial court as the wife suggested where the wife conceded that the equitable division was not erroneous.

Appeal by plaintiff and defendant from orders entered 31 March 2016 and 1 April 2016, and by plaintiff from order entered 29 September 2016, by Judge Lillian B. Jordan in New Hanover County District Court. Heard in the Court of Appeals 3 May 2017.

*Pennington & Smith, P.L.L.C., by Ralph S. Pennington, for plaintiff-appellant.*

*Ward and Smith, P.A., by John M. Martin, for defendant-appellee/cross-appellant.*

CALABRIA, Judge.

Where competent evidence supported the trial court's findings of fact in its equitable distribution and alimony orders, and those findings in turn supported its conclusions of law, the trial court did not err in its findings and conclusions. Where affidavits on attorney's fees were admitted into evidence without objection, and the trial court made explicit findings regarding trial counsel's experience and the reasonableness of his fees, the trial court did not abuse its discretion in awarding attorney's fees. However, where there was no evidence that an expert witness was a court-appointed expert, the trial court erred in awarding expert witness costs for any expense other than the expert's testimony. Where wife raised issues on cross-appeal that were not raised on appeal, and did so outside of the 30-day window for appeals but within the 10-day window for cross-appeals, the trial court erred in denying defendant's motion to dismiss her appeal with respect to the child support order. We affirm in part, remand in part, reverse in part, and dismiss in part.

## I. Factual and Procedural Background

Martin T. Slaughter ("husband") and Nicole B. Slaughter ("wife") were married on 21 September, 1996. Two children were born to the marriage. The parties separated on 18 May 2012, and husband filed a complaint on 1 April 2013, seeking child custody, child support, equitable distribution, and an interim distribution. He also filed a stipulation of marital misconduct. On 5 June 2013, wife filed an answer and counterclaim, seeking child custody, child support, equitable distribution, post-separation support and alimony, attorney's fees, and an interim distribution.

On 8 October 2012, a temporary consent order on custody and release of records was entered. This order provided that husband would release his mental health records, and that subject to his compliance in releasing those records, the parties would be awarded joint custody of the children, with wife having primary physical custody and husband having visitation.

On 26 June 2014, husband voluntarily dismissed his second and third claims (child support and equitable distribution) without prejudice.

On 5 August 2014, husband moved for partial summary judgment with respect to the classification of shares owned by husband and wife in Winner Enterprises of Carolina Beach, LLC ("Winner"). Husband's motion alleged that his shares should be classified as his separate property, and wife's shares as her separate property.

On 17 September 2014, the trial court entered an order on permanent custody. In this order, the trial court concluded that joint custody was in the children's best interest, and ordered that (1) the parties share joint legal custody; and (2) the parties share joint physical custody, with a schedule set out in the order.

On 4 February 2015, wife moved that the court appoint an expert to value Winner, and by extension value the shares of husband and wife in the company, as well as Baker & Slaughter, P.A., a law firm in which husband had an interest. On 26 March 2015, wife filed a motion requesting, if the North Carolina Child Support Guidelines were applicable to the instant case, that the trial court deviate from the guidelines.

On 31 March 2015, the trial court entered an order addressing multiple issues. First, the order required husband to pay wife an immediate interim distribution of $60,000. Second, husband was to be solely responsible for the children's school tuition. The trial court also set dates for mediation and trial, and appointed an expert to value Winner. This expert was also to value husband's interest in Baker & Slaughter, P.A.

On 19 June 2015, the parties agreed to several stipulations. First, they stipulated that their respective shares of Winner were separate property. They then stipulated to several facts about the value and date of acquisition of their shares of Winner.

On 8 October 2015, the trial court entered an order appointing an expert to value all real property owned by the parties, including real property owned by Winner. On 31 March 2016, the trial court entered its order on equitable distribution ("the ED order"). The trial court concluded that an unequal division of marital and divisible property in favor of wife was equitable, and that a division of 60%/40% in wife's favor was appropriate. The trial court then ordered (1) that separate property be distributed; (2) that husband deed a certain piece of real property to wife; (3) that wife deed a certain piece of real property to husband; and (4) that husband pay wife a distributive award of $494,772.

On 1 April 2016, the trial court entered its order on child support ("the child support order"). The trial court concluded that wife was entitled to child support from husband, and that the North Carolina Child

Support Guidelines were applicable to the case. The trial court then ordered husband to pay $1,700 in monthly child support, to terminate when the younger child reached majority, plus medical and dental health coverage and all premiums, plus all of the children's unreimbursed health care costs. Husband was also ordered to pay all summer camp expenses. Husband was entitled to claim one child as a dependent for tax purposes, and wife was entitled to claim the other child.

On 1 April 2016, the trial court also entered its order on alimony ("the alimony order"). The trial court concluded that wife was a dependent spouse and husband was a supporting spouse, that wife was entitled to alimony, that husband had engaged in infidelity prior to separation, that husband had the means and ability to pay alimony, and that wife, as a dependent spouse, was also entitled to an award of a portion of her attorney's fees. The trial court then ordered husband to pay $2,786 in monthly alimony payments, to terminate in 2024. Husband was also ordered to pay wife's attorney's fees in the amount of $50,000, minus a $30,000 stipulated credit, for a total of $20,000.

On 25 April 2016, husband filed notice of appeal from the ED order and the alimony order. On 3 May 2016, wife filed notice of cross-appeal from the ED order and the child support order.

On 10 June 2016, husband filed a motion to dismiss wife's cross-appeal of the child support order, on the grounds that (1) wife's cross-appeal of the child support order was filed more than 30 days after entry of that order, and (2) North Carolina Rule of Appellate Procedure 3(c), which permits a cross-appellant to file a cross-appeal within 10 days of receiving notice of appeal, should not apply here, because husband did not appeal the child support order. On 29 September 2016, the trial court denied this motion. On 3 October 2016, husband appealed this order as well.

## II. Findings of Fact and Conclusions of Law

In numerous arguments, husband contends that the trial court erred in failing to make certain findings of fact and conclusions of law, and in making erroneous findings of fact. We disagree.

### A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

B. Analysis

Husband challenges numerous findings of fact in the ED order and alimony order. We address husband's arguments with respect to each order in turn.

1. ED Order

Husband contends that, in the ED order, the trial court failed to make proper findings of fact and conclusions of law as to the value of husband's law practices; as to the value of an adjustment in value based on attorney compensation; as to North Carolina Rule of Evidence 414, governing the admissibility of evidence of past medical expenses; as to the capitalization rate for the valuation of husband's law practices; and as to goodwill. He also contends that the trial court erred by distributing divisible portions of the law practices to wife. With respect to Winner, he further contends that, in its ED order, the trial court made erroneous findings and failed to make findings as to Winner's appreciation; that the trial court erred in its valuation of wife's shares of Winner and in using that as a distributional factor; and that the trial court failed to make sufficient findings of fact and conclusions of law as to husband's ability to pay a distributional payment.

With respect to making "proper findings as to the law practices[,]" husband contends that the trial court's "entire substantive findings as to the valuation of the Law Practices . . . are just recitations of what Crawford said, not proper findings." Husband further notes that the two substantive issues on which Asa H. Crawford, Jr. ("Crawford"), the valuator appointed by the court pursuant to stipulation by both parties, and Dr. Craig Galbraith ("Galbraith"), plaintiff's expert, disagreed were "the attorney compensation adjustment and the calculation of the Cap Rate (including small firm premium)[,]" and that the trial court "made absolutely no findings as to these two *crucial* issues."

**[1]** In the ED order, the trial court entered numerous findings of fact as to the expertise of both Crawford and Galbraith. The court also noted and found that "when two experts value the same businesses and or professional associations" attorney compensation adjustment and the calculation of the discount rate and capitalization rate "are the two issues most often disagreed upon by the two experts." The trial court then examined Crawford's valuation and methodology used in his report in great detail, determined that Crawford "considered approved methods to value a business and /or a professional practice[,]" and ultimately relied upon Crawford's valuation in valuing and distributing the law practices. We acknowledge that the trial court did not make explicit

holdings with respect to attorney compensation adjustment and the calculation of the discount rate, as husband argues. However, calculation of these specific and disputed factors is not mandatory; rather, the trial court must make sufficient findings of fact based upon competent evidence, and must in turn base its conclusions of law upon those findings. In essence, husband argues that the trial court's findings are insufficient because the trial court did not consider the computational factors husband favors; that is not our standard of review on appeal. We hold that the trial court properly considered Crawford's report, and properly computed value and distributions based thereupon.

Similarly, husband raises a somewhat tortuous argument regarding Rule 414 of the North Carolina Rules of Evidence. Rule 414 limits the admissibility of evidence offered to pay past medical expenses. Husband contends that the application of this rule impacted his personal injury law practice. While we decline to rule on whether Rule 414 has any impact on the valuation of a law practice, we note that, as stated above, the trial court based its determination upon Crawford's report. Husband makes similar arguments with respect to "insufficient findings as to [the] capitalization rate" and "no findings as to goodwill[.]" The fact that the trial court may or may not have considered the evidence or factors husband preferred is not the issue before us; the issue is whether there was competent evidence to support the trial court's findings, and whether those findings in turn supported the trial court's conclusions. Husband concedes that Crawford recognized a decrease in the value of husband's personal injury practice. We hold that Crawford's report constituted competent evidence, and that it supported the trial court's findings on the valuation of the law practices.

**[2]** Husband next contends that the trial court erred by distributing the divisible portions of the law practices to wife. He bases this argument on the fact that "the trial court here failed to make required findings about the valuation of the Law Practices (including goodwill, attorney compensation, Rule 414 and the Cap Rate)." Inasmuch as we have held that the trial court did not err in failing to make these findings, we hold that the trial court did not err in its subsequent distribution of the divisible portion of the law practices.

**[3]** Next, husband challenges the trial court's determination as to the classification of appreciation in Winner as active or passive. We note, as a preliminary matter, that plaintiff did not object to Crawford opining on whether the appreciation was active or passive. In fact, plaintiff's counsel elicited testimony on this issue. Specifically, counsel noted that Crawford was "not commissioned to determine the active or passive

nature of these appreciations[,]" but that "once we look at it, it makes sense." Crawford was then directed to break down the appreciation in the value of the parties' shares of Winner based on passive increases, like inflation, and active increases, such as gifts. Counsel then noted that "this is really where the fight is" with respect to whether the valuation was active or passive.

In its order, the trial court relied upon Crawford's report in valuing the shares of Winner, specifically with respect to their appreciation, and in determining that "this appreciation was active appreciation during the marriage and prior to the date of separation that resulted from marital efforts during the marriage. This appreciation is marital property." The trial court further separated this active appreciation from "the appreciation attributable to 'Inflation' and 'Other'[,]" which it found to be passive appreciation. It therefore distributed the active appreciation as marital property, and the passive appreciation as divisible property.

On review of the record, we hold that the trial court's findings of fact were supported by competent evidence, specifically Crawford's report which was admitted without objection. Husband's arguments notwithstanding, Crawford opined as to the nature of whether income was passive or active, and the trial court relied upon that evidence in entering its findings, which in turn supported the trial court's conclusions. Accordingly, we hold that the trial court did not err in classifying the appreciation in parties' interests in Winner as active or passive, and distributing the increase accordingly.

**[4]** Lastly, husband contends that the trial court "erred by failing to make sufficient findings [of fact] and conclusions of law as to Husband's ability to pay $494,772.00 by 15 July 2016." Specifically, the trial court considered the parties' evidence in favor of unequal division, and, in considering that evidence, held that:

> [Husband] shall be distributed 40% of the total net estate that totals $1,376,823.00 and [wife] shall be distributed 60%. 60% is $826,094.00. Subtract from that the marital and divisible property distributed to [wife] of $331,322.00 and [wife] is entitled to a distributive award of $494,772.00.

The trial court then went on to observe, in its Finding of Fact 46, that

> [Husband] owns a very lucrative law practice and still has an interest in another law practice. Although he is a minority interest in Winner Enterprises, the evidence demonstrated that he has absolute control as a co-manager with

> his mother of Winner [E]nterprises. He is able to get distributions from Winner [E]nterprises whenever he needs to as evidenced by his unilaterally obtaining distributions from Winner Enterprises of more than $250,000.00 in the past two years. In addition, [husband] utilizes the Winner Enterprises American Express card for the payment of personal expenses, and his shares of Winner Enterprises are worth $825,294.00. Plaintiff has the means to pay the distributive award ordered below.

Husband contends that both the trial court and Crawford found that husband's Winner shares were not liquid, and that thus the trial court could not cite them as a liquid source for the distributive award payment. However, husband fails to challenge Finding 46, above, namely that husband has two sources of income from his law practices, an ability to unilaterally obtain liquid distributions from Winner, and the ability and willingness to use the Winner credit card to pay personal expenses. Since husband does not challenge Finding 46, it is binding upon us. We hold that this evidence supports the trial court's finding that husband has the means to pay the distributive award, and that that finding in turn supports the order to pay it.

2. Alimony Order

With respect to the alimony order, husband contends that the trial court failed to make proper findings of fact and conclusions of law with respect to Rule 414, with respect to the valuation of wife's shares of Winner, and with respect to husband's ability to pay the distributional payment. Husband's arguments on these points specifically reference his arguments made with respect to the ED order, and as we have addressed those arguments above, we need not repeat our conclusions here. We incorporate our holdings on these arguments herein, and once more hold that the trial court did not err in its findings of fact or conclusions of law with respect to these issues.

III. Fees and Costs

In numerous additional arguments, husband contends that the trial court erred in awarding various fees, costs, and distributions to wife. We agree in part and disagree in part.

A. Standard of Review

"The decision regarding whether to award attorney's fees 'lies solely within the discretion of the trial judge, and that such allowance is reviewable only upon a showing of an abuse of the judge's discretion.' "

*Kelly v. Kelly*, 167 N.C. App. 437, 448, 606 S.E.2d 364, 372 (2004) (quoting *Rickert v. Rickert*, 282 N.C. 373, 378, 193 S.E.2d 79, 82 (1972)). "North Carolina statutes and case law place the award of expert witness fees within the discretion of the trial court." *Bennett v. Equity Residential*, 192 N.C. App. 512, 513, 665 S.E.2d 514, 515 (2008).

B. Analysis

Husband contends that the trial court erred by awarding attorney's fees to wife relating to her alimony claim, and in awarding expert witness costs to wife in purported excess of statutory limits.

1. Attorney's Fees

**[5]** In the alimony order, the trial court ordered that husband "shall pay partial fees to [wife] for her incurred attorney fees in the amount of $50,000.00 minus the $30,000.00 credit he received upon stipulation of the parties[.]" Husband notes that, in order to award attorney's fees, the trial court had to make a finding as to defense counsel's skill, his hourly rate and the reasonableness thereof, what he did, and the hours he spent on the case. *See Falls v. Falls*, 52 N.C. App. 203, 221, 278 S.E.2d 546, 558 (1981). While husband concedes that wife submitted two affidavits regarding counsel's bill, and that the trial court found wife's attorney's hourly rate to be reasonable, husband nonetheless contends that the trial court "made no findings as to the reasonableness of fees charged, time spent or as to the reasonableness of the $50,000.00 it ordered to be paid."

Husband contends that the affidavits did not differentiate fees owed for child support, post-separation support, or alimony. Wife notes, however, that the affidavits were admitted into evidence without any objection. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C.R. App. P. 10(a)(1). Inasmuch as husband failed to object to the affidavits or their sufficiency at trial, he has failed to preserve that issue for appeal.

With respect to the trial court's findings, the trial court found:

> 39. [Wife's] attorney of record, John M. Martin, has submitted to the Court an affidavit. John M. Martin has been licensed as an attorney by the N.C. State Bar since 1975. His normal hourly rate is $395.00 per hour and this hourly rate is normal, customary, and reasonable for an attorney possessing the years of experience and expertise of John M. Martin. In addition, as indicated in [wife]'s Affidavit,

> other members of his firm including paralegals assisted Mr. Martin.
>
> 40. In [wife]'s attorney's Affidavit, she is requesting an attorney's fee award of $67,754.75 for time spent *on the alimony case only* up to and through February 21, 2016.
>
> 41. In the discretion of the Court, [wife] should be awarded $50,000.00 as partial attorney fees for the prosecution of her alimony claim against [husband]. Said amount of attorney fees is a reasonable amount of fees to be paid by [husband] on [wife]'s behalf and [husband] has the ability to pay the amount of attorney fees awarded.

(Emphasis added.) Because the affidavits were admitted without objection, we hold that they formed a sufficient evidentiary basis to permit the trial court to recognize wife's attorney's services, and the amount charged for them. The trial court explicitly found, within its discretion, that this fee was reasonable, based upon counsel's skill and expertise. The finding further reflects, notwithstanding husband's contentions, that the trial court made its determination solely based upon fees charged for work done in wife's alimony case, and not in prosecution of the remaining orders. As such, we hold that the trial court did not abuse its discretion in its award of attorney's fees.

2. Expert Witness Costs

**[6]** In the alimony order, the trial court also ordered that husband pay part of wife's fees for the cost of her expert witness, Melissa Dupuis ("Dupuis"), "in the amount of $20,000.00[.]" Husband contends that although the trial court awarded $20,000.00 in expert witness costs to wife, Dupuis' bills show only one entry, for $2,100.00, for actual testimony. Husband further contends that "there is no indication that Dupuis actually testified."

Husband's contention is somewhat curious, because Dupuis' testimony is present in the transcript of trial. Her direct and cross-examination spans over one hundred pages of transcript. Dupuis was accepted by the court as an expert in forensic accounting, without objection, and testified as to her accounting of the parties' incomes, specifically with respect to Winner and husband's law practices, and the calculation of alimony. Her testimony and reports were relied upon in both the child support order and the alimony order. It is clear, therefore, that Dupuis testified as an expert witness, and that the trial court was authorized by statute to award expert witness costs for that testimony.

The question, then, is whether the trial court could award costs for Dupuis' non-testimonial work. Our statutes provide that:

> In actions where allowance of costs is *not otherwise provided by the General Statutes*, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes.

N.C. Gen. Stat. § 6-20 (2015) (emphasis added). Husband correctly notes that, pursuant to our general statutes, expert witness costs may be awarded "solely for actual time spent providing testimony at trial, deposition, or other proceedings." N.C. Gen. Stat. § 7A-305(d)(11) (2015). Were these the only statutory provisions on point, it would seem that wife should only be able to cover for Dupuis' testimony, and no more.

However, the North Carolina Rules of Evidence are also codified in statute. Rule 706(b) provides that court-appointed experts "are entitled to reasonable compensation in whatever sum the court may allow" and that "the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs." N.C. Gen. Stat. § 8C-1, Rule 706(b) (2015). Thus, while ordinarily the costs of an expert may only be awarded for testimony given, the costs of a court-appointed expert are not subject to such limitation.

Wife contends that, despite submitting Dupuis as her own expert, Dupuis became a court-appointed expert. Wife cites several cases in which a prior order by the court required that an expert be appointed, and that, despite the expert being retained by one party, that expert was functionally a court-appointed expert, entitled to fees pursuant to Rule 706. *See Swilling v. Swilling*, 329 N.C. 219, 223-24, 404 S.E.2d 837, 840 (1991) (where the trial court ordered that, if parties could agree on an appraiser, it would appoint that appraiser, and if they could not, it would one of its own choosing; this was held to be "a show cause order within the meaning of Rule 706(a)[,]" and the expert was properly entitled to compensation under Rule 706); *Weaver Inv. Co. v. Pressly Dev. Assoc.*, 234 N.C. App. 645, 661, 760 S.E.2d 755, 764-65 (2014) (where the trial court ordered the appointment of forensic experts, and there was no evidence that the experts were not court-appointed, it was not error to award their fees as costs).

In the instant case, there is a subpoena in the record, compelling Dupuis to testify. And there are both motions to appoint expert witnesses,

and orders appointing expert witnesses, in the record. However, there are no orders in the record appointing a forensic accountant for purpose of alimony, nor any order mentioning Dupuis by name or role.

The instant case is thus distinguishable from the cases cited by wife. In those cases, there was some form of prior court order appointing an expert, thus placing the parties on notice that the expert might be considered court-appointed pursuant to Rule 706. In the instant case, however, no such prior order exists with respect to Dupuis. Although Dupuis' work was relied upon by the trial court in its alimony order, and although husband provided no expert of his own for alimony purposes, there does not appear to be a basis upon which Dupuis could have been considered a court-appointed expert. Accordingly, we hold that the trial court erred in awarding expert fees as costs, except inasmuch as those fees encompassed fees for testimony only. We remand this matter for the court to make more detailed findings as to the extent of fees owed for Dupuis' testimony, and to enter an award accordingly.

## IV. Motion to Dismiss

**[7]** Lastly, husband contends that the trial court erred in denying husband's motion to dismiss wife's child support appeal. We agree.

### A. Standard of Review

" 'Failure to give timely notice of appeal in compliance with . . . Rule 3 . . . is jurisdictional, and an untimely attempt to appeal must be dismissed.' " *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (quoting *Booth v. Utica Mut. Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983)).

### B. Analysis

On 31 March 2016, the trial court entered the ED order. On 1 April 2016, the trial court entered the child support order and the alimony order. On 25 April 2016, within thirty days of all orders being filed, husband filed notice of appeal from the ED order and the alimony order. On 4 May 2016, within ten days of husband's notice of appeal, wife filed notice of cross-appeal from the ED order and the child support order. In his motion to dismiss wife's appeal with respect to child support, husband contended that (1) the time for wife to appeal the child support order had expired, and (2) as husband had not appealed the child support order, wife could not cross-appeal it.

Pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, appeals must be taken within thirty days after entry of judgment if the party has been properly served. N.C.R. App. P. 3(c)(1).

However, "[i]f timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within ten days after the first notice of appeal was served on such party." N.C.R. App. P. 3(c). The rules are not explicit regarding whether such a notice of appeal, in a single proceeding resulting in multiple orders, is limited to the orders contained in the initial notice of appeal. Nor does our case law make explicit whether a cross-appeal is so limited. This is therefore a matter of first impression before this Court.

Although the matter is one of first impression, it is not altogether novel. We find our decision in *Surratt v. Newton*, 99 N.C. App. 396, 393 S.E.2d 554 (1990), enlightening. In *Surratt*, Jerry Newton brought a claim for summary ejectment against Katherine Surratt. Katherine Surratt filed counterclaims against Jerry Newton, in which she joined Paul Jeffrey Newton as a defendant. At the conclusion of a trial which ended in Katherine Surratt's favor, both Jerry and Paul Jeffrey Newton moved for judgment notwithstanding the verdict ("JNOV"); the trial court denied these motions on 17 April 1989. Jerry Newton gave notice of appeal on 19 April 1989. Paul Jeffrey Newton gave notice of appeal on 1 May 1989. Katherine Surratt moved to dismiss Paul Jeffrey Newton's untimely appeal. The trial court granted this motion, and Paul Jeffrey Newton appealed. *Id.* at 399-401, 393 S.E.2d at 556-57.

At the time of *Surratt*, Rule 3 provided a 10-day window for appeal, rather than the 30-day window for appeal in the present day. Paul Jeffrey Newton's notice of appeal was thus filed outside of the initial 10-day window for appeals. Nonetheless, on appeal, Paul Jeffrey Newton contended that he had 10 days to file his appeal after Jerry Newton did so. This Court acknowledged the language of Rule 3(c), which provides that, " '[i]f a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.' " *Id.* at 402, 393 S.E.2d at 557 (quoting N.C.R. App. P. 3(c)). However, we then proceeded to distinguish the scenario from that contemplated by the Rules:

> Here, defendant Paul Jeffrey Newton was not an original party to this action but brought into the suit by counterclaim of the plaintiff. Defendants Paul Jeffrey Newton and Jerry Newton were charged with separate violations for separate time periods that each managed the property. Each defendant was represented by his own counsel. The trial court carefully separated each issue as it related to each defendant and the jury rendered separate and distinct verdicts against each defendant. We hold that Rule 3(c) merely contemplates an additional, extended time

> period for a response only from other parties to that same appeal. Defendant Jerry Newton's appeal was totally unrelated and unaffected by the appeal of defendant Paul Jeffrey Newton.

*Id.* at 402, 393 S.E.2d at 557. As a result, we affirmed the trial court's dismissal of Paul Jeffrey Newton's untimely appeal.

We find particularly helpful the operative language "parties to that same appeal." While it is clear that, in the instant case, both husband and wife were parties to the entirety of the *proceedings* below, appeal is taken from an *order or judgment*, not an entire proceeding. Despite the appeals all involving the same underlying facts, as was somewhat true in *Surratt*, husband appealed only from the ED order and alimony order. Since he did not appeal from the child support order, he was not a party "to that same appeal."

This is not to say that wife could not have appealed from the child support order at all. We decline to rule that husband, in filing his notice of appeal first, was able to frame all issues and orders on appeal to the exclusion of any others. However, for wife to appeal from an order that husband did not challenge, it was incumbent upon her to do so within the initial 30-day window available to all new appeals. Her filing during the 10-day window for cross-appeals, inasmuch as it exceeded the initial 30-day window, limited her to address only those orders husband addressed in his appeal.

Our ruling is firmly rooted in the interests of fairness. Wife contends that husband's filing of notice of appeal, so close to the end of the 30-day window, prevented her from properly filing an appeal of her own, and thus limited her to filing a cross-appeal. We note, however, that her cross-appeal of the child support order had the same impact on husband, in that it precluded him from filing a cross-appeal from the child support order in response to wife's cross-appeal. We further note that, even in the event of an untimely appeal, a remedy exists in the form of the petition for certiorari, which wife did not file.

In the interests of clarity, we shall now make our holding on this issue explicit. In a matter in which multiple, separate orders issue, and one party appeals from some, but not all, of those orders, a cross-appellant who files her cross-appeal outside of the 30-day window contemplated by Rule 3(c), but within the 10-day window for cross-appeals, shall be limited to appeal from only those orders challenged in the original appeal. We strongly admonish parties who are considering appeal to act promptly to preserve their rights, even if they subsequently choose to

voluntarily dismiss their appeals, rather than to rely on the magnanimity of opposing counsel.

We hold therefore that, in the instant case, the trial court erred in denying husband's motion to dismiss wife's appeal of the child support order. We reverse the trial court's order denying the motion to dismiss.

V. Ownership Interest

**[8]** In her first argument, wife contends that the trial court erred in "failing to recognize that it had the legal authority to" transfer wife's ownership interest in Winner to husband. Wife concedes that she does not contend that the trial court's equitable division was in error, but instead offers that, if this Court "requires a remand to the District Court on equitable distribution," it should instruct the trial court to exercise its authority to transfer wife's shares of Winner to husband. Because we do not remand to the trial court on the ED order, we decline to instruct the trial court as wife suggests.

VI. Other Arguments

In her second, third, and fourth arguments, wife raises issues with respect to the child support order. Because we have held that the trial court erred in denying husband's motion to dismiss wife's cross-appeal of the child support order, we hold that this matter is not properly before us, and dismiss these arguments.

VII. Conclusion

With respect to husband's arguments on appeal, the trial court did not err in its findings of fact or conclusions of law, nor in awarding attorney's fees. However, it could only award expert witness fees for time actually spent testifying, and we remand for recalculation of those fees. We hold that wife's appeal of the child support order was untimely, and that the trial court erred in denying husband's motion to dismiss it.

With respect to wife's arguments on appeal, we dismiss her arguments with respect to the ED order, as she did not appeal from that order. We further hold that because the trial court erred in denying husband's motion to dismiss wife's cross-appeal of the child support order, that issue is not properly before us. We therefore dismiss wife's remaining arguments, all of which concern the child support order.

AFFIRMED IN PART, REMANDED IN PART, REVERSED IN PART, DISMISSED IN PART.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
FELIX RICARDO SALDIERNA

No. COA14-1345-2

Filed 18 July 2017

**Confessions and Incriminating Statements—juvenile—totality of circumstances—knowing, willing, and understanding waiver of rights**

The trial court erred by denying defendant juvenile's motion to suppress his statement to an interrogating officer where the totality of circumstances showed he did not knowingly, willingly, and understandingly waive his rights. Defendant, who had difficulty with English, signed a waiver that was in English only, and his unintelligible answers to questions did not show a clear understanding and a voluntary waiver of those rights.

On remand from the Supreme Court of North Carolina in accordance with their opinion, ___ N.C. ___, 794 S.E.2d 474 (2016). Previously heard by this Court on 2 June 2015, ___ N.C. App. ___, 775 S.E.2d 326 (2015), from appeal by defendant from order entered 20 February 2014 by Judge Forrest D. Bridges and judgment entered 4 June 2014 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. The issue addressed on remand is the validity of defendant's waiver of his statutory and constitutional rights.

*Attorney General Roy Cooper, by Assistant Attorney General Jennifer St. Clair Watson, for the State.*

*Goodman Carr, PLLC, by W. Rob Heroy, for defendant.*

BRYANT, Judge.

Where the totality of the circumstances shows that the juvenile defendant did not knowingly, willingly, and understandingly waive his rights pursuant to the State and federal constitutions or N.C. Gen. Stat. § 7B-2101(d), the trial court erred in denying defendant's motion to suppress his statement made to an interrogating officer, and we reverse, vacate, and remand.

Juvenile defendant Felix Ricardo Saldierna was arrested on 9 January 2013 at his home in South Carolina in connection with incidents involving

several homes around Charlotte that had been broken into on 17 and 18 December 2012.[1] Before questioning, the detective read defendant his rights and asked whether he understood them. Defendant ultimately signed a Juvenile Waiver of Rights form, of which defendant had been given two copies—one in English and one in Spanish. After initialing and signing the English language form, Felix, who was sixteen years old at the time, asked to call his mother before undergoing custodial questioning by Detective Kelly of the Charlotte-Mecklenburg Police Department. The call was allowed, but defendant could not reach his mother. The custodial interrogation then began. Over the course of the interrogation, defendant confessed his involvement in the incidents in Charlotte on 17 and 18 December 2012.

On 22 January 2013,

> [d]efendant was indicted . . . for two counts of felony breaking and entering, conspiracy to commit breaking and entering, and conspiracy to commit common law larceny after breaking and entering. On 9 October 2013, defendant moved to suppress his confession, arguing that it was illegally obtained in violation both of his rights as a juvenile under N.C.G.S. § 7B-2101 and of his rights under the United States Constitution. After conducting an evidentiary hearing, the trial court denied the motion in an order entered on 20 February 2014, finding as facts that defendant was advised of his juvenile rights and, after receiving forms setting out these rights both in English and Spanish and having the rights read to him in English by [Detective] Kelly, indicated that he understood them. In addition, the trial court found that defendant informed [Detective] Kelly that he wished to waive his juvenile rights and signed the form memorializing that wish.
>
> . . . .
>
> On 4 June 2014, defendant entered pleas of guilty to two counts of felony breaking and entering and two counts of conspiracy to commit breaking and entering, while reserving his right to appeal from the denial of his motion to suppress. The court sentenced defendant to a

1. *See State v. Saldierna*, ___ N.C. App. ___, ___, 775 S.E.2d 326, 327–30 (2015) and *State v. Saldierna*, ___ N.C. ___, 794 S.E.2d 474, 477–76 (2016) for more comprehensive statements of the facts.

> term of six to seventeen months, suspended for thirty-six months subject to supervised probation.
>
> The Court of Appeals reversed the trial court's order denying defendant's motion to suppress, vacated the judgments entered upon defendant's guilty pleas, and remanded the case to the trial court for further proceedings. The Court of Appeals recognized that the trial court correctly found that defendant's statement asking to telephone his mother was ambiguous at best. . . . [but it] held that when a juvenile between the ages of fourteen and eighteen makes an ambiguous statement that potentially pertains to the right to have a parent present, an interviewing officer must clarify the juvenile's meaning before proceeding with questioning.

*Saldierna*, ___ N.C. at ___, 794 S.E.2d at 476–77 (footnote omitted) (citations omitted). The Supreme Court of North Carolina granted the State's petition for discretionary review. *Id.* at ___, 794 S.E.2d at 477.

In reviewing this Court's opinion in *Saldierna*, the Supreme Court reasoned that "[a]lthough defendant asked to call his mother, he never gave any indication that he wanted to have her present for his interrogation, nor did he condition his interview on first speaking with her." *Id.* at ___, 794 S.E.2d at 479. As a result, the Supreme Court reversed the decision of the Court of Appeals "[b]ecause defendant's juvenile statutory rights were not violated[.]" *Id.* However, in doing so, the Supreme Court noted that "[e]ven though we have determined that defendant's N.C.G.S. § 7B-2101(a)(3) right [(to have a parent present during questioning)] was not violated, defendant's confession is not admissible unless he knowingly, willingly, and understandingly waived his rights." *Id.* (citing N.C.G.S. § 7B-2101(d)). Thus, the case was remanded to this Court "for consideration of the validity of defendant's waiver of his statutory and constitutional rights." *Id.*

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As the Supreme Court of North Carolina has determined that defendant's N.C.G.S. § 7B-2101(a)(3) right was not violated as "defendant's request to call his mother was not a clear invocation of his right to consult a parent or guardian before proceeding with the questioning[,]" *Saldierna*, ___ N.C. at ___, 794 S.E.2d at 475, the question before us now on remand is whether defendant knowingly, willingly, and understandingly waived his rights under section 7B-2101 of the North Carolina General Statutes and under the constitutions of North Carolina and the

United States, so as to make his confession admissible. We conclude that he did not.

> "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)). Findings of fact [as to whether a waiver of rights was made knowingly, willingly, and understandingly] are binding on appeal if [they are] supported by competent evidence, *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted), while conclusions of law [regarding whether a waiver of rights was valid and a subsequent confession voluntary,] are reviewed de novo, *State v. Ortiz-Zape*, 367 N.C. 1, 5, 743 S.E.2d 156, 159 (2013) (citing *Biber*, 365 N.C. at 168, 712 S.E.2d at 878), *cert. denied*, — U.S. —, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014).

*Id.* at ___, 794 S.E.2d at 477.

"In order to protect the Fifth Amendment right against compelled self-incrimination, suspects, including juveniles, are entitled to the warnings set forth in *Miranda v. Arizona*, prior to police questioning." *In re K.D.L.*, 207 N.C. App. 453, 457, 700 S.E.2d 766, 770 (2010) (citing 384 U.S. 436, 478–79, 16 L. Ed. 2d 694, 726 (1966)). Thus,

> [t]he North Carolina Juvenile Code provides additional protection for juveniles. Juveniles who are "in custody" must be advised of the following before questioning begins:
>
> (1) That the juvenile has the right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

*Id.* at 457–58, 700 S.E.2d at 770 (quoting N.C. Gen. Stat. § 7B-2101(a)(1)–(4) (2009)). "Previous decisions by our appellate division indicate the general *Miranda* custodial interrogation framework is applicable to section 7B-2101." *Id.* at 458, 700 S.E.2d at 770 (citing *In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009)); *see id.* at 459, 700 S.E.2d at 771 ("[W]e cannot forget that police interrogation is inherently coercive—particularly for young people." (citations omitted)).

"Before admitting into evidence any statement resulting from custodial interrogation,[2] the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." N.C. Gen. Stat. § 7B-2101(d) (2015); *State v. Oglesby*, 361 N.C. 550, 555, 648 S.E.2d 819, 822 (2007) ("Before allowing evidence to be admitted from a juvenile's custodial interrogation, a trial court is required to 'find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights.' " (quoting N.C.G.S. § 7B-2101(d))).[3]

"Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985) (citations omitted). "When determining the voluntariness of a confession, we examine the 'totality of the circumstances surrounding the confession.' " *State v. Hicks*, 333 N.C. 467, 482, 428 S.E.2d 167, 176 (1993) (quoting *State v. Barlow*, 330 N.C. 133, 140–41, 409 S.E.2d 906, 911 (1991)), *abrogated by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). Furthermore, "an express *written* waiver, while strong proof of the validity of the waiver, is not inevitably sufficient to establish a *valid* waiver." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (emphasis added) (citation omitted).

"The State must show by a preponderance of the evidence that the defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary." *State v. Flowers*, 128 N.C. App. 697, 701, 497 S.E.2d 94, 97 (1998) (citing *State v. Thibodeaux*, 341 N.C. 53, 58, 459

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2. The parties do not dispute that defendant was in custody at the time of questioning

3. Notably, in 2015, the General Assembly amended subsection (b) of N.C.G.S. § 7B-2101 to raise the age from 14 to 16 with regard to the admissibility of juveniles' in-custody admissions where a parent is not present: "When the juvenile is less than 16 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney." N.C. Sess. Laws 2015-58, § 1.1, eff. Dec. 1, 2015. At the time of his custodial interrogation on 9 October 2013, defendant in the instant case had turned 16 on 19 August 2013, less than two months before.

S.E.2d 501, 505 (1995)). Indeed, "the burden upon the State to ensure a juvenile's rights are protected is greater than in the criminal prosecution of an adult." *In re M.L.T.H.*, 200 N.C. App. 476, 489, 685 S.E.2d 117, 126 (2009) (citing *In re T.E.F.*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005)); *see also Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 ("The prosecution bears the burden of demonstrating that the waiver was knowingly and intelligently made[.]" (citation omitted)).

Here, in denying defendant's motion to suppress his confession, the trial court found and concluded in relevant part as follows regarding defendant's waiver of his juvenile rights:

**FINDINGS OF FACT**

1. That Defendant was in custody.
2. That Defendant was advised of his juvenile rights pursuant to North Carolina General Statute § 7B-2101.
3. That Detective Kelly of the Charlotte-Mecklenburg Police Department advised Defendant of his juvenile rights.
4. That Defendant was advised of his juvenile rights in three manners. Defendant was advised of his juvenile rights in spoken English, in written English, and in written Spanish.
5. That Defendant indicated that he understood his juvenile rights as given to him by Detective Kelly.
6. That Defendant indicated he understood his rights after being given and reviewing a form enumerating those rights in Spanish.
7. That Defendant indicated he understood that he had the right to remain silent. Defendant understood that to mean that he did not have to say anything or answer any questions. Defendant initialed next to this right at number 1 on the English rights form provided to him by Detective Kelly to signify his understanding.
8. That Defendant indicated he understood that anything he said could be used against him. Defendant initialed next to this right at number 2 on the English rights form provided to him by Detective Kelly to signify his understanding.

9. That Defendant indicated he understood that he had the right to have a parent, guardian, or custodian there with him during questioning. Defendant understood the word parent meant his mother, father, stepmother, or stepfather. Defendant understood the word guardian meant the person responsible for taking care of him. Defendant understood the word custodian meant the person in charge of him where he was living. Defendant initialed next to this right at number 3 on the English rights form provided to him by Detective Kelly to signify his understanding.

10. That Defendant indicated he understood that he had the right to have a lawyer and that he had the right to have a lawyer there with him at the time to advise and help him during questioning. Defendant initialed next to this right at number 4 on the English rights form provided to him by Detective Kelly to signify his understanding.

11. That Defendant indicated he understood that if he wanted a lawyer there with him during questioning, a lawyer would be provided to him at no cost prior to questioning. Defendant initialed next to this right at number 5 on the English rights form provided to him by Detective Kelly to signify his understanding.

12. That Defendant initialed a space below the enumerated rights on the English rights form then stated the following: "I am 14 years old or more and I understand my rights as explained by Detective Kelly. I DO with [sic] to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below."

13. That Defendant's signature appears on the English rights form below the initialed portions of the form. Defendant's signature appears next to the date, 1-9-13, and the time, 12:10. Detective Kelly signed her name as a witness below Defendant's signature.

14. That after being informed of his rights, informing Detective Kelly he wished to waive those rights, and signing the rights form, Defendant communicated to Detective Kelly that he wished to contact his mother by phone. . . .

. . . .

**CONCLUSIONS OF LAW**

1. That the State carried its burden by a preponderance of the evidence that Defendant knowingly, willingly, and understandingly waived his juvenile rights.

2. That the interview process in this case was consistent with the interrogation procedures as set forth in North Carolina General Statute § 7B-2101.

3. That none of Defendant's State or Federal rights were violated during the interview conducted of Defendant.

4. That statements made by Defendant were not gathered as a result of any State or Federal rights violation.[4]

In the instant case, defendant was sixteen years of age at the time he was interviewed by Detective Kelly and had only obtained an eighth

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4. "With respect to juveniles, both common observation and expert opinion emphasize that the distrust of confessions made in certain situations . . . is imperative in the case of children from an early age through adolescence." *In re Gault*, 387 U.S. 1, 48, 18 L. Ed. 2d 527, 557 (1967) (internal citation omitted); *see also In re J.D.B.*, 564 U.S. 261, 269, 180 L. Ed. 2d 310, 321 (2011) ("[The] risk [of false confessions] is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful Convictions of Youth et al. as *Amici Curiae* 21–22 (collecting empirical studies that 'illustrate the heightened risk of false confessions from youth')."). Indeed, even Justice Alito, in his dissenting opinion, acknowledged the "particular care" that must be taken with juveniles to ensure against involuntary confessions:

> [W]here the suspect is much younger than the typical juvenile defendant, courts should be instructed to take particular care to ensure that incriminating statements were not obtained involuntarily. The voluntariness inquiry is flexible and accommodating by nature, and the Court's precedents already make clear that "special care" must be exercised in applying the voluntariness test where the confession of a "mere child" is at issue. If *Miranda*'s rigid, one-size-fits-all standards fail to account for the unique needs of juveniles, the response should be to rigorously apply the constitutional rule against coercion to ensure the rights of minors are protected.

*Id.* at 297–98, 180 L. Ed. 2d at 340 (Alito, J., dissenting) (internal citations omitted).

grade education. Defendant indicated Spanish was his primary language. He stated he could write in English, but that he had difficulty reading English and difficulty in understanding English as spoken. The interrogation took place in the booking area of the Justice Center, and defendant was at all times in the presence of three law enforcement officers.[5] The transcript of the audio recording of Detective Kelly's conversation with defendant in which defendant was said to have "knowingly, willingly, and understandingly" waived his rights and agreed to speak with the detective reads, in full, as follows:

> K: You understand I'm a police officer, right?
>
> F: Yes maam.
>
> K: Ok, and that I would like to talk to you about this. And this officer has also explained to me and I understand that I have the right to remain silent, that means that I don't have to say anything or answer any questions. Should be right there number 1 right on there. Do you understand that?
>
> F: *[unintelligible] questions?*
>
> K: Yes, that is your right? So do you understand that? If you understand that, put your initials right there showing that you understand that. On this sheet. On this one. You can put it on both. Anything I say can be used against me. Do you understand that?
>
> F: Yes maam.
>
> K: I have the right to have a parent guardian or custodian here with me now during questioning. Parent means my mother, father, stepmother, or stepfather. Guardian means the person responsible for taking care of me. Custodian means the person in charge of me where I am living. Do you understand that? Do you want to read that?
>
> F: Yeah.[6]
>
> K: Do you understand that?

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5. Four officers were involved in defendant's arrest, including Detective Kelly.

6. It is unclear whether defendant's response—"Yeah"—is a response to the first question, "Do you understand that?" or a response to the second question, "Do you want to read that?"

F: *[no response]*

K: I have the right to talk to a lawyer and to have a lawyer here with me now to advise and help during questioning. Do you understand that?

F: *[unintelligible]*

K: If I want to have a lawyer with me during questioning one will be provided to me at no cost before any questioning. Do you understand that?

F: Yes maam.

K: Ok. Now I want to talk to you about some stuff that's happened in Charlotte. And um, I will tell you this. There's been some friends of yours that have already been questioned about these items and these issues. And they've been locked up. And that's what I want to talk to you about. Do you want to help me out and help me understand what's been going on with some of these cases and talk to me about this now here?

F: Uh

K: Are you willing to talk to me is what I'm asking.

F: Yes maam.

K: Ok. So I am 14 years or more. Let me see that pen. And I understand my rights as they've been explained by [D]etective Kelly. I do wish to answer questions now without a lawyer, parent, guardian or custodian here with me? My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or has promised me any special treatment because I have decided to answer questions now. I am signing my name below. Do you understand this? Initial, sign, date and time.[7]

[noise]

K: *it is 1/9/13. It is 12:10PM. [unintelligible background talking among officers]*

F: *Um, Can I call my mom?*

K: *Call your mom now?*

7. Notably, there is no recorded affirmative response by defendant to this question.

F: *She's on her um. I think she is on her lunch now.*

K: *You want to call her now before we talk?*

K [to other officers]: *He wants to call his mom.*

F: *Cause she's on, I think she's on her lunch.*

Other officer: *[unintelligible] He left her a message on her phone.*

F: *But she doesn't speak English.*

[conversation among officers]

K: I have mine. Can he dial it from a landline you think?

[more unintelligible conversation among officers]

[other officer]: step back outside and we'll let you call your mom outside. [unintelligible]. You're going to have to talk to her. Neither one of us speak Spanish, ok.

[more unintelligible conversation among officers].

9:50: [[defendant] can be heard on phone. Call is not intelligible.]

10:40 F [Phone can be heard making a phone call in Spanish]

[Sound of door closing].

K: 12:20: Alright Felix, so, let's talk about this thing going on. Like I said a lot of your friends have been locked up and everybody's talking. They're telling me about what's going on and what you've been up to. I'm not saying you're the ringleader of this here thing and some kind of mastermind right but I think you've gone along with these guys and gotten yourself into a little bit of trouble here. This is not something that's going to end your life. You know what I'm saying. This is not a huge deal. I know you guys were going into houses when nobody was home. You weren't looking to hurt anybody or anything like that. I just want to hear your side of the story. We can start off. I'm going to ask you questions I know the answer to. A lot of these questions are to tell if you're being truthful to me . . .

(emphasis added).

While our Supreme Court has held that defendant's question "Um, Can I call my mom?" was not sufficient to clearly invoke his statutory right to have his mother present, *see Saldierna*, ___ N.C. at ___, 794 S.E.2d at 475, this transcript nevertheless contains several "[unintelligible]" remarks or non-responses by defendant, mostly used to indicate defendant's "answers" to Detective Kelly's questions regarding whether or not he understood his statutory and constitutional rights. *Cf. Fare v. Michael C.*, 442 U.S. 707, 726–27, 61 L. Ed. 2d 197, 213 (1979) (concluding that a 16 ½-year-old juvenile "voluntarily and knowingly waived his Fifth Amendment rights" where "[t]here [was] no indication in the record that [the juvenile] failed to understand what the officers told him[,]" "no special factors indicate[d] that [the juvenile] was unable to understand the nature of his actions[,]" and the juvenile had "considerable experience with the police"). *But see* N.C.G.S. § 7B-2101(c) ("If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning.").

Although decided almost twenty years before *In re Gault*, and with much more egregious facts regarding the coercion of a confession from a juvenile, the United States Supreme Court in *Haley v. State of Ohio*, reasoned as follows:

> The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.
>
> But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed.[8] That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of

8. By stating "we are told that this boy was advised of his constitutional rights before he signed the confession," *Haley*, 332 U.S. at 601, 92 L. Ed. at 229, the Supreme Court was acknowledging that contrary to the police officers' testimony otherwise, the juvenile was not, in fact, advised of his right to counsel at any time, but was only given a typed version of his confession to sign, which included language at the beginning purporting to advise the juvenile of his "constitutional rights." *Id.* at 598, 92 L. Ed. at 228.

> choice. We cannot indulge those assumptions. *Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them.* They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain.

332 U.S. 596, 600–01, 92 L. Ed. 224, 229 (1948) (emphasis added) (reversing a fifteen-year-old boy's conviction for murder where his confession was obtained after a five-hour-long interrogation, which began at midnight, and where the boy was not advised of his rights and was not permitted to have counsel or a parent or family member present).

"The totality of the circumstances *must be carefully scrutinized* when determining if a youthful defendant has legitimately waived his *Miranda* rights." *State v. Reid*, 335 N.C. 647, 663, 440 S.E.2d 776, 785 (1994) (emphasis added) (citing *State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983)). The circumstances to consider in determining whether a wavier is voluntary (knowingly, willingly, and understandingly made) "includ[e] the background, experience, and conduct of the accused." *See Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (citation omitted).

In the instant case, there is no indication that defendant had any familiarity with the criminal justice system. Unlike the defendant in *Fare v. Michael C.*, there is no indication of "considerable experience with the police," 442 U.S. at 726, 61 L. Ed. 2d at 213, and, unlike in *Fare*, there are factors in the record in the instant case which indicate defendant did not fully understand (or might not have fully understood) Detective Kelly's questions such that he freely and intelligently waived his rights. *See id.*; *cf. Gallegos v. Colorado*, 370 U.S. 49, 54, 8 L. Ed. 2d 325, 328 (1962) ("The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, *no matter how sophisticated*, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights." (emphasis added)). Because the evidence does not support the trial court's findings of fact in the instant case that defendant "understood" Detective's Kelly's questions and statements regarding his rights, we conclude that he did not "legitimately waive[] his *Miranda* rights."

*See Fare*, 442 U.S. at 726–27, 61 L. Ed. 2d at 213. As a result, we decline to "give any weight to recitals," like the juvenile rights waiver form signed by defendant, "which merely formalize[d] constitutional requirements." *Haley*, at 601, 92 L. Ed. at 229; *see also Simpson*, 314 N.C. at 367, 334 S.E.2d at 59.

To be valid, a waiver should be voluntary, not just on its face, i.e., the paper it is written on, but *in fact*. It should be unequivocal and unassailable when the subject is a juvenile. The fact that the North Carolina legislature recently raised the age that juveniles can be questioned without the presence of a parent from age fourteen to age sixteen is evidence the legislature acknowledges juveniles' inability to fully and voluntarily waive essential constitutional and statutory rights.[9] Here, despite the trial court's many findings of fact that defendant "indicated he understood" Detective Kelly's questions and statements regarding his rights, the evidence as recorded contemporaneously during the questioning and as noted in testimony from the hearing, does not support those findings. Further, the findings do not reflect the scrutiny that a trial court is required to give in juvenile cases. At the very least, the evidence supporting the findings made by the trial court in the instant case was not substantial under the totality of the circumstances. *See Reid*, 335 N.C. at 663, 440 S.E.2d at 785.

Indeed, during voir dire and in response to the question "Did [defendant] also state that he might have some issues understanding English as it is spoken as well?" Detective Kelly answered, "I believe he did." Detective Kelly also testified that defendant told her "he wasn't very good at reading English." Thus, even if defendant did sign the English version of the Juvenile Waiver of Rights form, the evidence in the record simply does not fully support that defendant knew or understood the implications of what he was signing when he was signing it. *See Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 ("[A]n express written waiver, while strong proof of the validity of the waiver, is not inevitably sufficient to establish a valid waiver." (citation omitted)).

Furthermore, when Detective Kelly tells defendant "I am signing my name below," she then asks, "Do you understand this? Initial, sign, date and time," presumably instructing defendant to initial, sign, and date the *English* version of the form, which he does. But no response is recorded that he "understood" what was being asked by Detective Kelly—indeed, the next intelligible utterance made by defendant is "Um, can I call my mom now?" In fact, no copy of the Spanish version of the Juvenile Waiver

9. *See supra* note 3.

of Rights form, purportedly given to defendant contemporaneously with the English version which he signed, exists in the record; defendant was instructed to initial the English version of the form, which is in the record. Thus, Finding of Fact No. 4—"[t]hat [d]efendant was advised of his juvenile rights . . . in written Spanish," is not supported by competent *documentary* evidence in the record. Accordingly, despite defendant's "express written waiver," *see id.*, the evidence does not support the trial court's ultimate conclusion that defendant executed a valid waiver.

In addition, before beginning her questioning of defendant about multiple felony charges, Detective Kelly said, "This is not something that is going to end your life. You know what I am saying? This is not a huge deal[.]" Arguably, this statement mischaracterized the gravity of the situation in an attempt to extract information from a juvenile defendant.

Although there may be no duty for an interrogating official to explain a defendant's juvenile rights in any greater detail than what is required by statute, *see Flowers*, 128 N.C. App. at 700, 497 S.E.2d at 97, "[i]t is well established that juveniles differ from adults in significant ways and that these differences are especially relevant in the context of custodial interrogation." *Saldierna*, ___ N.C. at ___, 794 S.E.2d at 483 (Beasley, J., dissenting) (citations omitted). Such a mischaracterization by an interrogating official, then, surely cuts squarely against our legislature's "well-founded policy of special protections for juveniles," especially where, as here, nothing in the record indicates that defendant had any prior experience with law enforcement officers such that he would have been aware of criminal procedure generally or the consequences of speaking with the police. *Cf. Fare*, 442 U.S. at 726–27, 61 L. Ed. at 213 (concluding that a 16½-year-old juvenile "voluntarily and knowingly waived his Fifth Amendment rights" where, *inter alia*, the juvenile had "considerable experience with the police"); *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (considering the "background" and "experience" of the accused in determining the voluntariness of waiver); *see also* Cara A. Gardner, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile's Right to a Parent, Guardian, or Custodian During a Police Interrogation After* State v. Oglesby, 86 N.C. L. Rev. 1685, 1698 (2008) ("[The] policy of special protection [for juvenile defendants] is well-founded because of juveniles' unique vulnerabilities. Juveniles are uniquely vulnerable for two reasons: (1) *they are less likely than adults to understand their rights*; and (2) they are distinctly susceptible to police interrogation techniques." (emphasis added)).

Generally, we accept that the trial court resolves conflicts in the evidence and weighs the credibility of evidence and witnesses. *See State*

*v. O'Connor*, 222 N.C. App. 235, 241, 730 S.E.2d 248, 252 (2012). However, as we have noted, juvenile cases require special attention. *See Reid*, 335 N.C. at 663, 440 S.E.2d at 785.

Our Supreme Court has determined that this juvenile's request to call his mother after signing a waiver form was not an invocation of his right to have a parent present. *Saldierna*, ___ N.C. at ___, 794 S.E.2d at 475. However, defendant's act of requesting to call his mother immediately after he ostensibly executed a form stating he was giving up his rights, including his right to have a parent present, shows enough uncertainty, enough anxiety on the juvenile's behalf, so as to call into question whether, under all the circumstances present in this case, the waiver was (unequivocally) valid.

Here, the waiver was signed in English only, and defendant's unintelligible answers to questions such as, "Do you understand these rights?" do not show a clear understanding and a voluntary waiver of those rights.[10] Defendant stated firmly to the officer that he wanted to call his mother, even after the officer asked (unnecessarily), "Now, before you talk to us?" Further, defendant reiterated this desire, even in spite of the officer's aside to other officers in the room: "He wants to call his mom." Such actions would show a reasonable person that this juvenile defendant did not knowingly, willingly, and understandingly waive his rights. Rather, his last ditch effort to call his mother (for help), after his prior attempt to call her had been unsuccessful, was a strong indication that he did not want to waive his rights at all. Yet, after a second unsuccessful attempt to reach his working parent failed, this juvenile, who had just turned sixteen years old, probably felt that he had no choice but to talk to the officers. It appears, based on this record, that defendant did not realize he had the choice to refuse to waive his rights, as the actions he took were not consistent with a voluntary waiver. As a result, any "choice" defendant had to waive or not waive his rights is meaningless where the record does not indicate that defendant truly understood that he had a choice at all.

Furthermore, the totality of the circumstances set forth in this record ultimately do not fully support the trial court's conclusions of law, namely, "[t]hat the State carried its burden by a preponderance of the evidence that [d]efendant knowingly, willingly, and understandingly waived his juvenile rights." *See Ortiz-Zape*, 367 N.C. at 5, 743 S.E.2d at 159 (citing *Biber*, 365 N.C. at 168, 712 S.E.3d at 878) ("[C]onclusions of law are reviewed de novo and are subject to full review."). Here, too

10. *See supra* notes 6 and 7 and accompanying text.

much evidence contradicts the English language written waiver signed by defendant, which, in any event, is merely a "recital" of defendant's purported decision to waive his rights. *See Haley*, 332 U.S. at 601, 92 L. Ed. 2d at 229 ("[W]e cannot give any weight to recitals which merely formalize constitutional requirements."). Accordingly, it should not be considered as significant evidence of a valid waiver. *See Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 ("[A]n express *written* waiver, while strong proof of the validity of the waiver, is not inevitably sufficient to establish a *valid* waiver." (emphasis added) (citation omitted)).

"Our criminal justice system recognizes that [juveniles'] immaturity and vulnerability sometimes warrant protections well beyond those afforded adults. It is primarily for that reason that a separate juvenile code with separate juvenile procedures exists." *In re Stallings*, 318 N.C. 565, 576, 350 S.E.2d 327, 333 (1986) (Martin, J., dissenting). Indeed, "at least two empirical studies show that the vast majority of juveniles are *simply incapable of understanding* their *Miranda* rights and the meaning of waiving those rights." *Oglesby*, 361 N.C. at 559 n.3, 648 S.E.2d at 824 n.3 (Timmons-Goodson, J., dissenting) (emphasis added) (citation omitted).

> Even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely. Indeed, the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.

*J.D.B. v. North Carolina*, 564 U.S. 261, 269, 180 L. Ed. 2d 310, 321 (2011) (alteration in original) (internal citations omitted).

In conclusion, based on the totality of the circumstances, we hold the trial court erred in concluding that defendant knowingly, willingly, and understandingly waived his statutory and constitutional rights, and therefore, the trial court erred in denying defendant's motion to suppress. Accordingly, we reverse the order of the trial court, vacate the judgments entered upon defendant's guilty pleas, and remand to the trial court with instructions to grant the motion to suppress and for any further proceedings it deems necessary.

VACATED, REVERSED, AND REMANDED.

Chief Judge McGEE and Judge DIETZ concur.

**STATE v. BACON**

[254 N.C. App. 463 (2017)]

STATE OF NORTH CAROLINA
v.
JAWANZ BACON

No. COA16-1268

Filed 18 July 2017

**1. Larceny—felonious—variance in indictment and proof at trial—ownership of stolen property—no special custodial interest—additional property was surplusage**

The trial court did not err by denying defendant's motion to dismiss a felonious larceny charge based on an alleged fatal variance between the owner of the stolen property taken from a home as alleged in the indictment and the proof of ownership of the stolen items presented at trial where the indictment properly alleged the owner of some but not all of the stolen property. The homeowner had no special custodial interest in the stolen property belonging to her adult daughter who did not live with her or the stolen property belonging to a friend. Any allegations in the indictment for the additional property that were not necessary to support the larceny charge were mere surplusage.

**2. Larceny—felonious—motion to dismiss—sufficiency of evidence—value**

The trial court erred by failing to dismiss a felonious larceny charge based on insufficient evidence of the value of the stolen goods where the jury was only instructed on felonious larceny based upon the stolen items having a value in excess of $1,000.00, and not based on larceny pursuant to breaking or entering. The State presented no evidence of the combined value of a television and earrings, and the property was not, by its very nature, obviously greater than $1,000.00.

**3. Discovery—sanctions—alibi witness—failure to give proper notice**

The trial court did not abuse its discretion in a felonious larceny case by excluding defendant's alibi witness as a sanction for defendant's violation of discovery rules regarding proper notice of a witness. Even assuming error, defendant failed to show it was prejudicial or that there was a reasonable possibility of a different outcome where the alibi witness's testimony was contradictory and two State witnesses identified defendant as the perpetrator after viewing the video of the actual break-in.

**4. Constitutional Law—effective assistance of counsel—failure to meet burden of proof—objective standard of reasonableness—deficient performance**

Although defendant's ineffective assistance of counsel claim in a felonious larceny case was premature and should have been initially considered by a motion for appropriate relief to the trial court, the Court of Appeals concluded he did not receive ineffective assistance of counsel where he failed to meet his burden of showing that his attorney's performance fell below an objective standard of reasonableness or that any deficient performance of his attorney prejudiced him.

Appeal by Defendant from judgment entered 29 June 2016 by Judge D. Jack Hooks in Superior Court, Columbus County. Heard in the Court of Appeals 15 May 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General James Bernier, Jr., for the State.*

*Sarah Holladay for Defendant.*

McGEE, Chief Judge.

## I. *Statement of the Facts*

April Faison's ("Ms. Faison") residence at 276 Lakeview Drive in Whiteville, North Carolina ("the residence"), was broken into on 4 December 2013. Ms. Faison's adult daughter, Ashley Colson ("Ms. Colson"), lived next door, and discovered the break-in. Ms. Colson called Ms. Faison that afternoon and informed Ms. Faison of the break-in. Ms. Faison came home to find her back door open with the glass broken out of it, the home "tossed," and several items missing, including a flatscreen television ("the television"), a PlayStation 3 videogame system with three video games ("the gaming system"), a laptop computer ("the laptop"), a Canon camera ("the camera"), and two gold earrings ("the earrings"). Ms. Faison called 911 to report the break-in, and police responded. After the police officers left the residence, Ms. Faison and Ms. Colson reviewed video recorded from her home surveillance system that was stored in a DVR box in Ms. Faison's bedroom ("the video"). The video showed a man breaking the glass in the back door to the residence,

entering, and removing items from the residence.[1] The man's face was clearly visible in the video.

On 5 December 2013, Ms. Faison informed Detective Trina Worley of the Columbus County Sheriff's Office ("Detective Worley") about the video, and Detective Worley inquired about obtaining a copy of the video. When Ms. Faison could not figure out how to make a copy of the video, she carried the DVR box to the sheriff's office for law enforcement to view the video. Three detectives plugged in the DVR box and attempted to view the video, but were unable to locate the video.

At trial, Defendant objected to any reference to the video, arguing that the proper foundation had not been laid for admission of the video as evidence. During Ms. Faison's *voir dire*, the trial court determined that Ms. Faison was competent to testify about the video. Ms. Faison testified to the following: The video showed a man break the glass in the back door of Ms. Faison's residence, enter her residence through that door, and then remove items from Ms. Faison's residence. The man's face was clearly visible on the video and there were multiple instances, as the man looked around, when his face was directly visible. The man was not wearing a "hoodie," mask, or hat to obscure his face. Ms. Faison later saw a man walking down the road near her residence whom she believed to be the man in the video. She observed him enter a nearby house. Ms. Faison reported this information to the police, who initiated surveillance of the house and identified the man as Jawanz Bacon ("Defendant").

In accordance with the policy of the Columbus County Sheriff's Office, Detective Worley had a photo lineup prepared, with six pictures (Defendant and five "fillers") of men of similar age, race, height, and build. Captain Soles — an officer not involved in the investigation of the case — and who did not know the facts of the case or the identity of Defendant, administered the lineup to Ms. Faison on 31 December 2013. About thirty minutes later, Captain Soles administered the lineup to Ms. Colson, who was not present at the earlier lineup presentation. Both Ms. Faison and Ms. Colson positively identified Defendant as the man who broke into Ms. Faison's residence. Defendant was arrested on 31 December 2013 and was indicted for felony breaking or entering and felonious larceny. Defendant's indictment for felonious larceny reads as follows:

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1. Ms. Faison testified that she did not think about her surveillance equipment until after the police had left her residence.

> [D]efendant named above unlawfully, willfully and feloniously did steal, take and carry away a flatscreen television, PlayStation 3 video game system, three video games for PlayStation 3, laptop computer, Canon camera, two gold earrings, the personal property of April Faison, such property having a value of $1,210.00, pursuant to a violation of Section 14-54 of the General Statutes of North Carolina.

Section 14-54 states in relevant part: "Any person who breaks or enters any building with intent to commit any . . . larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-54(a) (2015). Although all of the stolen items were taken from Ms. Faison's home, and the television and the earrings belonged to Ms. Faison, the laptop belonged to her daughter, Ms. Colson, and the camera and the gaming system belonged to a friend of Ms. Faison. The stolen items were never recovered.

At trial, Defendant sought to call his grandfather, Jimmy Bacon ("Mr. Bacon"), as an alibi witness. However, the State objected because Defendant had not provided adequate notice of this alibi witness as required by N.C. Gen. Stat. § 15A-905(c)(1). The trial court allowed a *voir dire* of Mr. Bacon in which Mr. Bacon testified that Defendant was with him at his home the entire day of 4 December 2013. However, when questioned, Mr. Bacon could not recall any details as to specific dates of Defendant's stay or what Defendant did during his stay. The trial court ultimately granted the State's motion to exclude Mr. Bacon's testimony.

Defendant moved to dismiss at the close of the State's evidence and again at the close of all evidence, but Defendant's motions were denied. During the charge conference, Defendant pointed out that the State had not presented any evidence to prove the value of the items stolen and, therefore, the jury should not be instructed on felony larceny based upon the stolen items being in excess of $1,000.00. The State maintained that specific evidence of the value of the stolen items was unnecessary because the jury, based upon the nature of the items themselves, could determine that the items had a value of more than $1,000.00. The trial court agreed with the State and instructed the jury on felonious larceny based upon value in excess of $1,000.00, with misdemeanor larceny as a lesser-included charge. However, the trial court declined to instruct the jury on felony larceny resulting from a breaking or entering. The jury found Defendant guilty of felony breaking or entering and felonious larceny with value in excess of $1,000.00. Defendant appeals.

## II. *Analysis*

Defendant contends the trial court erred: (1) by denying Defendant's motion to dismiss the larceny charge due to a fatal variance between the indictment and the evidence presented at trial; (2) by failing to dismiss the larceny charge for insufficiency of the evidence as to the value of the stolen items; and (3) by abusing its discretion in excluding Mr. Bacon's alibi testimony.

### A. *Fatal Variance in the Indictment*

**[1]** Defendant first argues the trial court erred in denying his motion to dismiss the felonious larceny charge. More specifically, Defendant contends there was a fatal variance between the owner of the stolen property as alleged in the indictment and the proof of ownership of the stolen items presented at trial. We agree in part.

Defendant asks this Court to vacate his felonious larceny conviction. Defendant argues that, while the indictment alleged Ms. Faison to be the owner of all the property stolen from her residence, the evidence at trial demonstrated she was not the owner of the laptop or the gaming system. We agree with Defendant, but note that Defendant failed to address the items properly attributed to Ms. Faison in the indictment – the television and the earrings – and what that means for Defendant's motion to dismiss. Although Defendant concedes that some of the items listed in the indictment were correctly listed as the property of Ms. Faison, he contends that fatal variances with respect to other items included in the indictment require quashing the indictment and further require dismissal of all larceny charges.

In support of his argument, Defendant cites *State v. Seelig* for the proposition that " 'the evidence in a criminal case must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, there is a fatal variance between the allegations and the proof requiring dismissal.' " *State v. Seelig*, 226 N.C. App. 147, 162, 738 S.E.2d 427, 438 (2013) (citation omitted). However, Defendant appears to have overlooked the following paragraph in *Seelig*:

> "[A]n indictment 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " In order to be fatal, a variance must relate to "an essential element of the offense." Alternately, "[w]hen

> an averment in an indictment is not necessary in charging the offense, it will be 'deemed to be surplusage.' "

*Id.* at 162–63, 738 S.E.2d at 438 (citations omitted).

Defendant provides no argument or citations to any legal authority to support the proposition that a larceny indictment that properly alleges the owner of certain stolen property, but improperly alleges the owner of additional property, must be dismissed in its entirety. Because Defendant fails to make this argument on appeal, it is abandoned. *See State v. Evans*, __ N.C. App. __, __, 795 S.E.2d 444, 455 (2017); N.C.R. App. P. 28 (2017) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned. . . . . The body of the argument . . . shall contain citations of the authorities upon which the appellant relies."). Defendant has abandoned this argument, and we dismiss it.

Assuming, *arguendo*, that Defendant has not abandoned this argument, we find no error.

> In North Carolina our courts have been clear that:
>
> > The general law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest. If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit.
> >
> > Furthermore, although the law acknowledges that a parent has a special custodial interest in the property of his minor child kept in the parent's residence, that special interest does not extend to a caretaker of the property even where the caretaker had actual possession.

*State v. Salters*, 137 N.C. App. 553, 555–56, 528 S.E.2d 386, 389 (2000) (citations omitted).

The indictment in a larceny case is required to allege the ownership of the stolen property in order to: "(1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial, and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense." *State v. Holley*, 35 N.C. App. 64, 67, 239 S.E.2d 853, 855 (1978) (internal citations and quotations omitted).

Concerning ownership of stolen property, a variance between an indictment and the evidence presented at trial can be fatal: " 'If the proof shows that the article stolen was not the property of the person alleged in the indictment to be the owner of it, the variance is fatal and a motion for judgment of nonsuit should be allowed.' " *State v. Schultz*, 294 N.C. 281, 285, 240 S.E.2d 451, 454 (1978) (citation omitted). "It is, however, sufficient if the person alleged in the indictment to be the owner has a special property interest, such as that of a bailee or a custodian." *Id.* at 285, 240 S.E.2d at 454-55; *see also State v. Carr*, 21 N.C. App. 470, 472, 204 S.E.2d 892, 894 (1974); *State v. Smith*, 266 N.C. 747, 749, 147 S.E.2d 165, 166 (1966) (where no fatal variance occurred when a father, who had custody and control of his daughter's pistol at the time the pistol was stolen, was found to be a bailee). The fact that items were stolen from a particular residence does not automatically give rise to a special property interest in the owner of that residence. *See State v. Eppley*, 282 N.C. 249, 259-60, 192 S.E.2d 441, 448 (1972) (where a fatal variance was found when a stolen shotgun belonged to the homeowner's father, and not the homeowner named in the indictment).

In the present case, while Ms. Faison did have actual possession of all of the stolen items — as they were taken from her home — she was not the owner of the laptop, the camera, or the gaming system. Further, the State failed to produce any evidence that Ms. Faison was a bailee or otherwise had a special property interest in those items. *Id.*

The State, relying on *State v. Carr*, argues that a possessor has a special property interest in an item when that person has sole possession, use, and control of the item. *State v. Carr*, 21 N.C. App. 470, 471-72, 204 S.E.2d 892, 893-94 (1974). However, *Carr* is readily distinguishable from the present case because, in *Carr*, a son was found to have a special interest in a vehicle owned by his father's business and the son regarded the vehicle as his own, possessing it at all times and taking it with him to college. *See id.* When Ms. Faison was asked whether she owned all of the items stolen from her house, she answered: "No. . . . . The laptop was my daughter's, and the . . . camera and the game[ing system] was [sic] my friend's." Ms. Faison merely stated that the items were in her possession in her home at the time of the theft, but provided no more information relating to any possible special interest in the property. Not only did the State fail to produce evidence tending to show that Ms. Faison regarded the laptop, the camera, and the gaming system as her own, it also failed to show how Ms. Faison came to possess these items or that she had any special interest in them whatsoever.

The State further argues that "a parent has a special custodial interest in the property of his minor child kept in the parent's residence," and therefore Ms. Faison had a special property interest in her daughter's laptop. *See State v. Salters*, 137 N.C. App. 553, 555-56, 528 S.E.2d 386, 389 (2000). However, as Defendant points out, Ms. Colson is not the minor child of Ms. Faison, but rather is an adult child who did not live in Ms. Faison's home. Therefore, we distinguish the present case from *Salters* and turn to *Eppley* for guidance. In *Eppley*, no special property interest was found where a father's shotgun was stolen from his son's home, but no evidence was presented that the person named in the indictment – the son – was a bailee or had any special property interest in the shotgun. *Eppley*, 282 N.C. at 259-60, 192 S.E.2d at 448. When asked whether she owned all of the items stolen from her house, Ms. Faison answered: "No. . . . . The laptop was my daughter's." Nothing in the evidence beyond Ms. Faison's actual possession of the laptop suggests that she had a special property interest in it. The present case is much like *Eppley* in that Ms. Faison actually possessed an adult relative's property in her home when the property was stolen, but no evidence whatsoever was provided to show that Ms. Faison held any special interest in the property.

We, therefore, hold that the evidence presented at trial was sufficient to demonstrate that Ms. Faison was the owner of the television and the earrings, but that there was a fatal variance between the ownership of the laptop, the camera, and the gaming system as alleged in the indictment, and the evidence of ownership presented at trial.

While we have located no authority directly on point regarding a fatal variance in ownership of some, but not all, of the items alleged to have been stolen, in general: "A defect in an indictment is considered fatal if it *wholly fails to charge some offense* . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (emphasis added) (internal citations and quotations omitted). Further, "[w]hen an averment in an indictment is not necessary in charging the offense, it will be 'deemed to be surplusage.' " *Seelig*, 226 N.C. App. at 163, 738 S.E.2d at 438 (citations omitted). As the indictment included all the required elements alleging Defendant stole the television and the earrings from Ms. Faison's residence, the indictment properly alleged all the elements of larceny. Any allegations in the indictment that were not necessary to support the larceny charge – whether felony larceny or the lesser-included offense of misdemeanor larceny – are deemed to be surplusage. *Id.* We are therefore left with an indictment that reads as follows:

> The defendant named above unlawfully, willfully and feloniously did steal, take and carry away a flatscreen television, . . . [and] two gold earrings, the personal property of April Faison, such property having a value of $1,210.00, pursuant to a violation of Section 14-54 of the General Statutes of North Carolina.

"It is usually held . . . that the verdict of the jury is not vulnerable to a motion in arrest of judgment because of defects in the indictment, unless the indictment *wholly* fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943) (internal citations omitted) (emphasis added). Where there are less serious defects, it is proper to object by motion to quash the indictment or to demand a bill of particulars. *Id.* We therefore affirm the trial court's denial of Defendant's motion to dismiss the larceny charge based upon an alleged fatal variance between the indictment and the evidence presented at trial, and we address Defendant's additional arguments without considering the surplusage contained in the larceny indictment.

B. *Evidence of Value to Support Felonious Larceny*

**[2]** Next, Defendant argues the trial court erred in failing to dismiss the felonious larceny charge for insufficiency of the evidence. Specifically, Defendant contends there was insufficient evidence as to the value of the stolen items. We agree.

We review the denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). The evidence is viewed in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

N.C. Gen. Stat. § 14-72 provides two separate bases for elevating misdemeanor larceny to felonious larceny relevant to this appeal: (1) "Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony[,]" N.C. Gen. Stat. § 14-72(a) (2015); and (2) "[t]he crime of larceny is a felony, without regard to the value of the property in question, if the larceny is . . . [c]ommitted pursuant to a violation of . . . [N.C. Gen. Stat. §] 14-54[.]" N.C. Gen. Stat. § 14-72(b)(2)

(2015). N.C. Gen. Stat. § 14-54(a) states: "Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-54(a) (2015).

The language of the indictment appears to have charged Defendant with felonious larceny pursuant to both N.C.G.S. § 14-72(a) and 14-72(b)(2):

> [D]efendant named above unlawfully, willfully and feloniously did steal, take and carry away a flatscreen television . . . [and] two gold earrings, the personal property of April Faison, such property having a value of $1,210.00, pursuant to a violation of Section 14-54 of the General Statutes of North Carolina.[2]

However, the trial court expressly declined to instruct the jury on the charge of felony larceny committed pursuant to N.C.G.S. § 14-54 – intent to commit larceny after breaking or entering. When the State requested that the trial court instruct the jury on felonious larceny after breaking or entering, the judge responded:

> You may be right, and when it's over, you show me and I'll apologize to you and tell you I'm wrong. But we tried it this way off this indictment, and we are going to stay with the instructions off this indictment, which to my mind are value in excess of $1,000.

We have long recognized that "a defendant may not be convicted of an offense on a theory of his guilt different from that presented to the jury." *State v. Smith*, 65 N.C. App. 770, 773, 310 S.E.2d 115, 117 (1984). For example: "[A] conviction for felony larceny may not be based on the value of the thing taken when the trial court has instructed the jury only on larceny pursuant to burglarious entry." *Id.* Thus, because the jury was only instructed on felonious larceny based upon the stolen items having a value in excess of $1,000.00, Defendant's conviction could not have been based on larceny pursuant to breaking or entering.

The trial court instructed the jury solely on felonious larceny based upon the stolen property having a value in excess of $1,000.00 pursuant to N.C.G.S. § 14-72(a). The trial court also instructed the jury on the lesser-included offense of misdemeanor larceny. In response to

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2. We have removed the language deemed surplusage in our analysis of Defendant's first argument above, and only consider the property of Ms. Faison in our analysis – the television and the earrings.

Defendant's objection to the lack of evidence of value presented at trial, the trial court ruled that the value of the stolen items was a question of fact for the jury to decide, even though the State presented no specific evidence concerning the value of any of the stolen items.

However, this Court has held that a jury cannot estimate the value of an item without any evidence put forth to establish a basis for that estimation. *See In re J.H.*, 177 N.C. App. 776, 778-79, 630 S.E.2d 457, 459 (2006) (where the jury could not presume that a five-year-old Ford Focus had a value over $1,000.00 absent any evidence of the car's condition or value). Though certain property may, by its very nature, be of value obviously greater than $1000.00, like the Ford Focus in *J.H.*, the television and the earrings in this matter are not such items. Because the State presented no evidence upon which the jury could reasonably ascertain the combined value of the television and the earrings, the State failed to meet its burden of proving the value element of felonious larceny. We hold that the State failed to present sufficient evidence at trial to support the charge of felonious larceny and, therefore, the trial court erred in denying Defendant's motion to dismiss that charge.

It is proper to vacate and remand for entry of judgment and resentencing on a lesser-included offense when a trial court instructed the jury on a lesser-included offense, along with the greater offense, and the jury necessarily found that all the elements necessary to establish the lesser-included offense were proven, but the evidence presented at trial was insufficient to prove an essential element of the greater offense. *State v. Snead*, 239 N.C. App. 439, 448, 768 S.E.2d 344, 350 (2015); *see also State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) ("in finding defendant guilty of [the greater offense], the jury necessarily had to find facts establishing the [lesser offense] . . . [so] it follows that the verdict returned by the jury must be considered a verdict of guilty of [the lesser offence]"). Accordingly, we vacate Defendant's conviction of felonious larceny and remand for entry of judgment and re-sentencing for misdemeanor larceny.

### C. *Defendant's Alibi Witness*

**[3]** Finally, Defendant argues that the trial court abused its discretion by excluding Defendant's alibi witness as a sanction for Defendant's violation of discovery rules. We disagree.

The trial court granted the State's motion to exclude Mr. Bacon based upon Defendant's failure to give timely notice that he intended to call Mr. Bacon as an alibi witness. When the State complies with its

discovery obligations, the defendant is required to give notice of any alibi defense within twenty working days after the case is set for trial. N.C. Gen. Stat. § 15A-905(c)(1).

> (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> . . . .
>
> (3) Prohibit the party from introducing evidence not disclosed[.]
>
> (b) Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article.

N.C. Gen. Stat. § 15A-910 (2015).

"A trial court's decision concerning the imposition of discovery-related sanctions . . . may only be reversed based upon a finding that the trial court abused its discretion, which means that the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Allen*, 222 N.C. App. 707, 733, 731 S.E.2d 510, 528 (2012) (internal citation, quotation, and bracketing omitted).

In making its decision, the trial court considered the materiality of Mr. Bacon's proposed testimony. When asked about specifics regarding Defendant's stay at his home, Mr. Bacon testified as follows:

> Q. Now, on the day in question, that is, December 4, 2013, was [Defendant] residing with you?
>
> A. Yes.
>
> Q. And how long had that been the case?
>
> A. He comes and stay with me weeks at a time. I remember the incident good, because it was my birthday. December 2nd is on my birthday.
>
> Q. *So he had come to visit you on December 2nd?*
>
> A. Yeah.
>
> Q. And he had stayed over through December 4th?

A. Yeah.

Q. Were you aware of his whereabouts over the course of December 4th?

A. Yeah. He was there with me.

Q. For what period of time was he there with you?

A. He was there earlier. *He was there a couple days before my birthday and stayed until – I remember my wife taking him home and bringing – and coming back with the newspaper. The newspaper come out on Thursday. And she read about it in the newspaper. And I said, "Well, how could he do that when he was here?"*

Q. In particular, sir, what we are asking about is – you may not have been with him every second of every moment, every minute. *What period of time can you definitely testify as to his whereabouts?*

A. I don't live on no big estate, you know. I live in a small house. *I had an eye on him. He was right there. He didn't go nowhere.*

Q. For December 12th – excuse me – December 4th?

A. Yeah. *Until that Thursday. That's when his grandma took him home.*

Q. And *do you recall what date that was*, sir?

A. It was – *I know the newspaper come out on Thursday. Because my birthday is on the 2nd. So he was there until Thursday. I can't recall what date that was.*

Q. All right, sir.

A. But *it had to happen before then, because it was already in the newspaper when my wife came home with it.* (Emphasis added).

The incident occurred on 4 December 2013. Generally, Mr. Bacon's testimony was very vague concerning Defendant's whereabouts during the relevant time period. Mr. Bacon could not account for Defendant's whereabouts for any specific part of 4 December 2013, even had he been able to establish that Defendant was residing with him on that day.

More specifically, Mr. Bacon ties the date he remembers Defendant being with him — 4 December 2013 — to an article in the paper that

apparently identified Defendant as the suspect in the 4 December 2013 incident. Mr. Bacon testified that he knew Defendant was with him on 4 December 2013 because the very next day, "[t]he newspaper come [sic] out[.] And [my wife] read about it in the newspaper. And I said, 'Well, how could he do that when he was here?' " However, Defendant was not arrested until 31 December 2013, and no article related to his arrest could have been published before that date. Therefore, Mr. Bacon's testimony suggested he was remembering Defendant being at Mr. Bacon's residence on a date after 31 December 2013. This contradicts the record, which shows that, after his arrest on 31 December 2013, Defendant was in custody until 9 October 2014. Given that no article could have been published about Defendant's arrest before Defendant was arrested and given that Defendant spent 283 days incarcerated after his arrest, Mr. Bacon's testimony regarding his wife taking Defendant home and bringing back the alleged newspaper article is not reliable.

Considering the materiality of Mr. Bacon's proposed testimony, which we find minimal, and the totality of the circumstances surrounding Defendant's failure to comply with his discovery obligations, we cannot find that the trial court abused its discretion in excluding this testimony pursuant to N.C.G.S. § 15A-910.[3] *Allen*, 222 N.C. App. at 733, 731 S.E.2d at 528.

Even were we to assume, *arguendo*, that it was error for the trial court to exclude Mr. Bacon's testimony as a discovery sanction, Defendant has failed to show that the error was prejudicial. In order to show prejudice requiring reversal, Defendant must show "that there is a reasonable possibility that a different result would have been reached had the error not been committed. N.C. Gen. Stat. § 15A–1443(a) (2005)." *State v. Jones*, 188 N.C. App. 562, 569, 655 S.E.2d 915, 920 (2008). As discussed above, Mr. Bacon's testimony was disjointed, imprecise, and seemingly contradicted by the facts. We do not believe Mr. Bacon's testimony would have provided meaningful alibi evidence for Defendant on 4 December 2013.

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3. Defendant argues that he should be awarded a new trial because the trial court failed to make findings of fact, as required by N.C.G.S. § 15A-910(d), beyond that notice had not been given. However, the failure to make findings of fact does not *per se* require a new trial. *State v. Adams*, 67 N.C. App. 116, 122, 312 S.E.2d 498, 501 (1984) ("the failure to make such findings here thus does not merit reversal or remand"). In the present case, Defendant fails to show how the exclusion of the single alibi witness equates to the "extreme sanction" of dismissal of charges or what prejudice Defendant suffered from the lack of detailed findings of fact. *State v. Foster*, 235 N.C. App. 365, 379, 761 S.E.2d 208, 218 (2014). Given the circumstances of this case, we decline to hold that the trial court abused its discretion by excluding the testimony of Defendant's alibi witness. *Adams*, 67 N.C. App. at 122, 312 S.E.2d at 501.

Ms. Faison recognized Defendant as he was walking down the street and reported this to the police, who followed up and identified Defendant. Both Ms. Faison and Ms. Colson *independently* identified Defendant, with near certainty, as the perpetrator after they had, according to their testimony, viewed the video of the actual break-in and had received multiple good looks at Defendant during the break-in and larceny. We conclude there was no reasonable possibility that the jury would have reached a different result had Mr. Bacon's alibi testimony been allowed. *See Jones*, 188 N.C. App. at 570, 655 S.E.2d at 920.

**[4]** Finally, Defendant's ineffective assistance of counsel claim is premature and should have been initially considered pursuant to a motion for appropriate relief by the trial court. *State v. Parmaei*, 180 N.C. App. 179, 185, 636 S.E.2d 322, 326 (2006) ("claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal"). However, we hold that Defendant's ineffective assistance of counsel claim must fail for the same reasons mentioned immediately above.

To prevail on an ineffective assistance of counsel claim, Defendant must demonstrate not only that the trial counsel's conduct fell below an objective standard of reasonableness, but must also prove that his attorney's deficient performance prejudiced Defendant such that Defendant was deprived of a fair trial. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). For the reasons discussed above, we hold that Defendant has failed to meet the burden of showing either that his attorney's performance fell below an objective standard of reasonableness, or that any deficient performance of his attorney prejudiced Defendant. Defendant's claim of ineffective assistance of counsel is without merit.

## III. *Conclusion*

Defendant does not challenge his conviction for felony breaking or entering, so that conviction stands. We hold that the trial court erred in denying Defendant's motion to dismiss with respect to the charge of felony larceny, but that the evidence and the elements properly found by the jury support entry of judgment for the lesser- included offense of misdemeanor larceny. We therefore vacate Defendant's conviction for felony larceny and remand for resentencing based upon misdemeanor larceny. Defendant's arguments related to the exclusion of Mr. Bacon's testimony fail.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
JONATHAN WAYNE BROYHILL, DEFENDANT

No. COA16-841

Filed 18 July 2017

**1. Evidence—expert witness testimony—psychiatrist—failure to proffer witness as an expert**

The trial court did not err in a first-degree murder, attempted murder, and assault with a deadly weapon with intent to kill inflicting serious injury case by excluding the proffered testimony of defendant's psychiatrist based on failure to disclosure him as an expert witness under N.C.G.S. § 15A-905(c)(2). Even if he was testifying as a lay witness, the court acted within its discretion by excluding the testimony under N.C.G.S. § 8C-1, Rule 403 where the probative value was substantially outweighed by the danger of unfair prejudice, misleading the jury, and confusion of the issues.

**2. Jury—voir dire—prospective jurors—ability to assess credibility of witnesses—stakeout questions—indoctrination of jurors**

The trial court did not abuse its discretion in a first-degree murder, attempted murder, and assault with a deadly weapon with intent to kill inflicting serious injury case by restricting defendant's voir dire of prospective jurors concerning their ability to fairly assess the credibility of witnesses where the questions were designed to stakeout and indoctrinate prospective jurors. Defendant was allowed to achieve the same inquiry when he resumed questioning in line with the pattern jury instructions.

**3. Confessions and Incriminating Statements—prior custodial statements—exclusion of some but not all**

The trial court did not abuse its discretion in a first-degree murder, attempted murder, and assault with a deadly weapon with intent to kill inflicting serious injury case by excluding two of defendant's prior custodial statements while admitting a third statement into evidence at trial even though defendant maintained the two prior statements should have been admitted under N.C.G.S. § 8C-1, Rule 106 to enhance the jury's understanding of the third. A review of the two prior interview transcripts revealed no statement which, in fairness, should have been considered contemporaneously with the third.

Appeal by defendant from judgments entered 19 March 2015 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 19 April 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.*

*Rudolf Widenhouse, by M. Gordon Widenhouse Jr., for defendant-appellant.*

ELMORE, Judge.

Defendant Jonathan Broyhill was convicted of first-degree murder for the death of Jamie Hahn, and attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury against Nation Hahn. Defendant appeals, arguing that (1) the trial court erred in excluding the testimony of his psychiatrist, Dr. Badri Hamra, on the basis that Dr. Hamra's proffered testimony constituted expert opinion testimony which had not been disclosed pursuant to a reciprocal discovery order; (2) the trial court unduly restricted defendant's *voir dire* of prospective jurors concerning their ability to fairly assess the credibility of witnesses; and (3) the trial court erred in excluding defendant's two prior custodial statements while admitting the third statement into evidence at trial. Upon review, we conclude that defendant received a fair trial, free from error.

## I. Background

On 20 May 2013, a Wake County Grand Jury indicted defendant on charges of first-degree murder, attempted first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. A jury trial was held at the 23 February 2015 Criminal Session of the Superior Court for Wake County, the Honorable Paul C. Ridgeway presiding. The State's evidence at trial tended to show the following:

Defendant was a close friend to Nation and Jamie Hahn. He and Nation became friends after a church trip, when Nation was entering his freshman year of high school in Lenoir. Defendant had just graduated from the same school but Nation would often visit him at his job in a local paint store. After high school, Nation attended the University of North Carolina at Chapel Hill, where he met Jamie while both were volunteering for a presidential campaign. Nation and Jamie started dating and were eventually married. As with Nation, defendant and Jamie quickly became friends. Defendant even served as Nation's best man at the Hahns' wedding.

In April 2010, Jamie hired defendant at her political consulting firm, Sky Blue Strategies. Sky Blue provided clients with a variety of campaign services, including strategy, fundraising, and compliance. U.S. Congressman Brad Miller hired Sky Blue the following year for his re-election campaign. Jamie focused on fundraising and strategy, while defendant handled Federal Elections Commission (FEC) compliance, managed campaign donations, and disbursed funds for campaign expenses. Defendant was a signatory on the campaign's bank account.

In fall 2011, Congressman Miller suspended his re-election campaign, leading Sky Blue to shift its focus from fundraising toward issuing refund checks to donors. Due to the change in circumstances, defendant became primarily responsible for the remaining work on the campaign. Unbeknownst to Jamie, defendant wrote checks to himself out of the campaign account from June 2011 to March 2013. The checks totaled more than $46,500.

Near the end of his employment with Sky Blue, defendant started to complain of various health issues. In August 2012, he told the Hahns he had Multiple Sclerosis and was seeking treatment. Defendant also reported problems with his gallbladder, claiming he had scheduled surgery to remove gallstones. In November or December 2012, defendant expressed to Jamie that, in light of his health problems, he would need to find a less stressful job. Recognizing that Sky Blue could no longer afford to pay defendant without revenue from the Miller campaign, Jamie agreed to help defendant find a job elsewhere.

Jamie soon discovered that certain Miller campaign expenses had not been paid. Although he was no longer employed by Sky Blue, defendant continued to manage campaign finances and FEC quarterly reports. In early 2013, Jamie received inquiries from campaign staffers concerning delays in refund check disbursements. Defendant avoided Jamie's requests for information on the campaign finances, citing his preoccupation with the upcoming gallbladder surgery.

Defendant eventually agreed to meet with Jamie at the Hahns' home on 8 April 2013 to draft the quarterly report due the following week. When he failed to show, defendant claimed he was working late at his new job with LabCorp, a job he did not have. Defendant agreed to reschedule their meeting for the next evening. Upon his arrival, defendant appeared "very weak, sort of white faced." He told Nation that doctors had discovered a spot when they removed his gallstones, a spot which they believed was pancreatic cancer. Stunned by the news, the Hahns spent the evening comforting defendant rather than drafting the report.

Two days later, the Hahns arranged to take defendant to Duke Cancer Hospital to confirm his diagnosis. When defendant failed to meet at their home as planned, Nation and Jamie became concerned and drove to defendant's house. He answered the door "in a daze," claiming he overslept. At this point, defendant realized he would certainly miss the appointment. He pretended to call the hospital to reschedule for the next day and, at Jamie's suggestion, agreed to help with the quarterly report for the rest of the afternoon. Moments after arriving at the Hahns' home, defendant informed Jamie that he forgot to bring his computer. He left to retrieve it but never returned. Jamie made repeated attempts to contact defendant to no avail.

When the Hahns finally heard from defendant the next morning, he told them he was at the beach. He said he had been fired from LabCorp, and with his "presumed cancer diagnosis," he "just needed to get away." Defendant apologized and assured Jamie that he would be back in time to prepare the quarterly report. The Hahns, meanwhile, had planned a week-long vacation at the beach to celebrate their anniversary and Nation's birthday. Jamie asked defendant to reschedule his doctor's appointment for 15 April 2013, so that she and Nation could attend before leaving for the beach.

On Sunday, 14 April 2013, defendant purchased a large chef's knife before driving to the Hahns' residence to finalize the quarterly report with Jamie. He and Jamie met downstairs while Nation worked upstairs in his office. During their meeting, Jamie received a message from Nation informing her that, according the FEC website, the Miller campaign's 2012 fourth quarter report had never been filed. When pressed by Jamie, defendant assured her that he filed the report and had received confirmation via facsimile from the FEC.

The next morning, Jamie and defendant met with Congressman Miller's campaign treasurer, John Wallace, to review the completed draft of the quarterly report. The report revealed a continuing indebtedness to Congressman Miller, a debt which Wallace believed had been retired. He requested that the draft be amended to reflect the debt as paid before the report was submitted to the FEC. At the time, a separate discrepancy in the draft report was overlooked. The report indicated that the campaign had $62,914.52 in cash at the end of the first quarter when, in fact, the campaign account had a negative balance of $3,587.06.

After the meeting with Wallace, Nation and Jamie drove defendant to Duke Cancer Hospital for his appointment. Upon their arrival, the Hahns dropped defendant off at the entrance to check in while Nation

and Jamie parked the car. When they reconvened inside, defendant said he had to go in for tests and the nurses would call the Hahns if needed. Nation and Jamie sat down in the lobby while defendant went through a set of double doors behind the reception desk. Defendant admitted to police that he did not have a doctor's appointment that day. He walked around the hospital for nearly two hours while the Hahns waited in the lobby. When he returned, defendant told them "he did indeed have pancreatic cancer but the doctors were hopeful."

The Hahns drove defendant back to Raleigh before leaving for the beach. On the way out of town, Jamie received a call from Congressman Miller's office informing her that a check written from the campaign account had bounced. Based on the first quarter report, Jamie believed the campaign account had more than sufficient funds. She decided that the returned check must have been a mistake.

On Wednesday, 17 April 2013, Wallace e-mailed Jamie and defendant about recent communications between the FEC and the Miller campaign. The FEC had requested additional information to address concerns over suspicious disbursements from the campaign account. The FEC had also informed the campaign that it had failed to timely file a report covering the last quarter of 2012. Defendant responded on the e-mail thread: "Good afternoon, John. I am working on this now, and I will be in touch." In light of defendant's prior assurances and his e-mail response, Jamie assumed that defendant had the issues under control. Defendant never followed up with Wallace.

The Hahns returned from the beach the following Sunday. Shortly after midnight, defendant used Nation's credit card to purchase a one-way airline ticket from Charlotte to Las Vegas, departing Monday afternoon. He canceled his flight reservation one hour before take-off. Defendant opted instead to purchase a one-way train ticket from Raleigh to Charlotte, departing Tuesday morning.

On Monday, 22 April 2013, defendant and Jamie met at the Hahns' home to finalize matters with Congressman Miller's campaign. In his backpack, defendant concealed the chef's knife he had recently purchased. Nation arrived home around 5:00 p.m. Jamie, he noticed, was on the phone in her office downstairs and defendant was walking through the kitchen. Nation greeted defendant with a hug and invited him to stay the night before another doctor's appointment in the morning. Defendant answered equivocally but added that "he had his clothes packed with him in case he did." After their brief conversation, Nation proceeded upstairs to change out of his work clothes and into his running gear.

Shortly thereafter, Nation heard Jamie screaming from downstairs. He threw open the bedroom door and ran down the stairs shouting, "What's happening?" Jamie cried out, "He's trying to kill me." Nation rounded the corner of the staircase when he saw blood on the floor and defendant standing over Jamie with a knife. Nation shouted, "What the fuck are you doing?" Defendant said nothing as he turned and came at Nation, raising the knife in the air as he moved closer. Nation grabbed the blade with one hand and started striking defendant in the face with the other. As the struggle continued, Nation yelled at Jamie to get out of the house. Jamie, covered in blood, ran out the side door and collapsed in a neighbor's yard. After gaining separation from defendant, Nation followed Jamie out of the house while shouting for someone to call 9-1-1. Neighbors tended to Nation and Jamie until the ambulance arrived.

Police surrounded the Hahns' home and ordered defendant to come outside. He exited the house calmly with his hands in the air. Officer Roy Smith observed self-inflicted knife wounds on defendant's wrists and a stab wound to his stomach. To Officer Smith, defendant's self-inflicted wounds were indicative of an attempted suicide. Officer Smith rode in the ambulance transporting defendant to the hospital. As EMS workers spoke with defendant, he became visibly upset and started weeping. He told them, "It's been a long time coming," and said repeatedly, "I just want to die."

Jamie died in the hospital two days later as a result of her injuries. An autopsy revealed multiple stab wounds, including one to her torso which penetrated her liver, and another to her chest which penetrated her lung and severed an artery. Nation survived the attack with injuries to his hands, including a deep laceration which transected an artery, tendons, and nerves in two fingers on his left hand.

While defendant was hospitalized, police conducted three custodial interviews on 23, 25, and 26 April 2013, respectively. The State introduced the recording and transcript of the 26 April interview, which were published to the jury. Over defendant's objection, the court declined to admit transcripts of the 23 and 25 April interviews.

During the 26 April 2013 interview, defendant admitted that he had embezzled money from the Miller campaign and had lied about his gallbladder surgery, his pancreatic cancer, and his appointments at Duke Cancer Hospital. Defendant also reported bouts with depression and thoughts of suicide, claiming he often heard voices telling him to hurt other people, he had bought the knife to hurt himself, and he had planned on traveling to Las Vegas to commit suicide. At his last meeting

with Jamie, defendant anticipated a conversation about the discrepancies in the campaign account. When asked to describe his memory of that night, defendant recalled stabbing Jamie but did not recall attacking Nation or cutting himself.

At trial, defendant offered testimony of his family members and a nurse psychotherapist, Susan Simon, who saw defendant for ten sessions between February and May 2012. Among other things, Ms. Simon testified that during the sessions defendant expressed feelings of worthlessness and depression. Upon the State's objections, the court refused to admit the proffered testimony of Dr. Badri Hamra, a psychiatrist with the North Carolina Department of Public Safety, who treated defendant fifteen months after his arrest.

At the conclusion of trial, the jury found defendant guilty of first-degree murder, attempted first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced defendant to a term of life in prison without parole, and consecutive terms of 157 to 201 months and 73 to 100 months. Defendant entered notice of appeal in open court.

## II. Discussion

### A. Discoverable Expert Opinion Testimony

**[1]** Defendant first argues that the trial court erred in excluding the proffered testimony of Dr. Hamra. After *voir dire*, the court determined that Dr. Hamra was rendering expert opinion testimony, thereby triggering the discovery requirements of N.C. Gen. Stat. § 15A-905(c)(2). Because defendant failed to disclose Dr. Hamra as an expert witness pursuant to the reciprocal discovery order, the court did not allow Dr. Hamra to testify at trial. The court also concluded, in the alternative, that Dr. Hamra's testimony was not relevant, and if it was, the probative value of his testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Defendant maintains that Dr. Hamra was testifying as a fact witness, outside the scope of the reciprocal discovery order, and the testimony was relevant to the issue of premeditation and deliberation, such that the court's decision to exclude it constitutes reversible error.

Rule 702(a) of the North Carolina Rules of Evidence provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise . . . ."

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). An expert's testimony relies upon "scientific, technical or other specialized knowledge" to "provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *State v. McGrady*, 368 N.C. 880, 889, 787 S.E.2d 1, 8 (2016). Lay testimony, by contrast, is based on personal knowledge of facts "which can be perceived by the senses." N.C. Gen. Stat. § 8C-1, Rule 602 cmt. (2015); *see also* N.C. Gen. Stat. § 8C-1, Rule 701 (2015) (providing that lay opinion testimony is limited to opinions which are "rationally based on the perception of the witness"). A lay witness may state " 'instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, *derived from observation of a variety of facts presented to the senses at one and the same time*.' " *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911)[1] (emphasis added) (quoting John Jay McKelvey, *Handbook of the Law of Evidence* § 132 (rev. 2d ed. 1907)), *quoted in State v. Stager*, 329 N.C. 278, 321, 406 S.E.2d 876, 901 (1991).

Our Supreme Court recently explained the threshold difference between expert opinion and lay witness testimony: "[W]hen an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment 'to assist' the jury based on his 'specialized knowledge,' he is rendering an expert opinion." *State v. Davis*, 368 N.C. 794, 798, 785 S.E.2d 312, 315 (2016) (footnote omitted) (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a)); *see also* David P. Leonard, *The New Wigmore: Expert Evidence* § 2.6 (2009) ("[W]hile an expert relies on scientific, technical, or other specialized knowledge, lay testimony is based solely on the perception of the witness. . . . Application of specialized knowledge from whatever source would bring the testimony within the sphere of expertise." (footnote omitted) (internal quotation marks omitted)).

Ultimately, "what constitutes expert opinion testimony requires a case-by-case inquiry" through an examination of "the testimony as a whole and in context." *Davis*, 368 N.C. at 798, 785 S.E.2d at 315. We review *de novo* the trial court's conclusion that Dr. Hamra's proffered testimony constitutes discoverable expert opinion testimony. *See id.* at 797–98, 785 S.E.2d at 314–15 (applying *de novo* review to determine "whether the State's expert witnesses gave opinion testimony so as to trigger the discovery requirements under section 15A-903(a)(2)").

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1. We have maintained the predominant citation to the North Carolina Reports, for the sake of consistency, but include the correct citation for those individuals referencing the bound volumes: *State v. Leak*, 156 N.C. 518, 521 (1911).

" 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

During *voir dire*, defendant elicited the following testimony from Dr. Hamra:

Q. As a psychiatrist, do you ever prescribe medication for an inmate if you believe that it will help them to deal with any mental health issues they may be dealing with?

A. Yes, sir.

. . . .

Q. When you treated Mr. Broyhill, did you prescribe any medications for him to take to deal with his mental health issues?

A. Yes, I did.

Q. Among the medications that you prescribed for Mr. Broyhill, were any of them for anxiety, depression, or psychosis?

A. All of them were.

Q. Could you please tell us what medications you prescribed for Mr. Broyhill when he was your patient.

A. There are four medications given to him. One is called Effexor XR. . . . The next one is Zoloft . . . . The third one is Buspar . . . . And the last one is Risperdal . . . .

. . . .

Q. Even though you review a patient's past summary, do you still make your own evaluation as to whether that patient is in need of medication?

A. That is my job, sir.

. . . .

Q. Did your review of the medical summary that was provided indicate that he had been on psychiatric medications prior to coming into your care?

A. Yes, he was.

. . . .

Q. When a patient gets transferred from one facility to another, does that patient continue to get psychiatric medications that had been prescribed for him at the previous facility?

A. He will be automatically on them until he sees the doctor, which is in case me [sic], and then I make a decision whether to keep them or change them.

Q. And then if you decide to change it, at that point, you can change it?

A. Oh, absolutely, yes.

Q. Is this what happened in Mr. Broyhill's case?

A. No, sir. He stayed on the same medications.

Q. Did he stay—did he continue to receive psychiatric medications until you were able to see him yourself?

A. Yes.

Q. After you saw him, you continued him on these medications?

A. Yes, I did.

. . . .

Q. . . . Dr. Hamra, to your knowledge and based upon the records you reviewed, is it fair to say that since his arrest Mr. Broyhill has been held in custody as a safekeeper and has consistently been prescribed psychiatric medications for his mental health needs?

A. Yes, sir.

Q. Would you prescribe these types of medications for an inmate if they didn't need it?

A. That would be unprofessional, sir.

Q. In the present system, do inmates sometimes request a psychiatric medication even though they might not suffer from a mental illness?

A. Sometimes that happens, yes.

Q. Would you prescribe a medication for an inmate simply because they asked for it?

A. I hope not. I don't.

Q. Would there have to be a legitimate medical reason for prescribing a patient a psychiatric medication?

A. That's the way it should be.

Based on the foregoing, we agree with the trial court that Dr. Hamra intended to offer expert opinion testimony. He testified in no uncertain terms that defendant had a psychiatric condition for which he, Dr. Hamra, prescribed medication. He then clarified that his decision to prescribe medication was based not merely on his review of defendant's medical history but on his own evaluation of defendant. Finally, he confirmed that he would only have prescribed medication for "a legitimate medical reason," dismissing the notion that he would write a prescription simply because defendant asked him to do so.

As the Supreme Court concluded in *Davis*, it is immaterial that Dr. Hamra's testimony was not elicited through the typical question: " 'Doctor, do you have an opinion?' " *Davis*, 368 N.C. at 802, 785 S.E.2d at 317. His testimony was tantamount to a diagnosis, which requires the application of specialized knowledge to his observations of defendant, and which ventures beyond simply "reporting what he saw or experienced through his senses." *Id.* at 798, 785 S.E.2d at 315. And while defendant argued at trial that the testimony was offered not as proof of diminished capacity but to show he was truthful with police about his mental faculties, the relevance of the latter still rests upon Dr. Hamra's psychiatric evaluation.

Assuming *arguendo* that Dr. Hamra was not testifying as an expert, the trial court nevertheless acted within its discretion by excluding his testimony under Rule 403. "The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (citation omitted). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2015). The trial court is in the best position to evaluate relevance. *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004). While its rulings on relevance are not entirely discretionary, such rulings are afforded "great deference on appeal." *Id.*

Even if relevant, evidence may nevertheless "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2015). Whether relevant evidence satisfies the Rule 403 balancing test is a discretionary ruling reviewed on appeal for abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). An abuse of discretion occurs "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Dr. Hamra first met with defendant fifteen months after defendant's arrest. He reviewed a summary of defendant's medical records from Raleigh's Central Prison, but it is not clear whether Dr. Hamra had access to records of defendant's treatment before his arrest. Although his diagnosis and treatment may have *some* probative value, bearing on defendant's state of mind and credibility, Dr. Hamra's testimony does not speak directly to defendant's condition at the time of Jamie Hahn's death.

To the extent that it was relevant, there was a substantial risk that the testimony would unfairly prejudice the State, mislead the jury, and result in confusion of the issues. As the trial court aptly explained in its order:

> [T]he naked testimony of Dr. Hamra that medications were required and helpful to the Defendant in July 2014, without being subjected to the strictures of Rule 702, would have the substantial likelihood of confusing the issues of this case, misleading the jury, and would invite the jury to speculate the nature of these medication[s], the nature of the conditions these medications are used to treat, the reliability of the diagnosis, the duration of the condition(s), and the effect of these conditions on the Defendant's state of mind and credibility at any time relevant to the alleged criminal conduct.

Defendant offered Dr. Hamra's testimony without evidence of his credentials, the medical reports he reviewed, the results of any examinations he performed, or the underlying basis for his opinions. To admit the testimony without the required prior disclosure would have deprived the State of effective cross-examination and hindered the trial court's ability to fulfill its gatekeeping obligations under Rule 702. Both the court and the State would have been left to accept Dr. Hamra's evaluation at face value.

Because Dr. Hamra's proffered testimony constituted expert opinion testimony, which defendant failed to disclose pursuant to the reciprocal discovery order, the trial court did not err in excluding the testimony at trial. Alternatively, even if Dr. Hamra was testifying as a fact witness, the trial court did not abuse its discretion in excluding his testimony under Rule 403. The probative value of the testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

### B. *Voir Dire* of Prospective Jurors

**[2]** Defendant next argues that the trial court erred during jury selection by unduly restricting defendant's inquiry into whether prospective jurors could fairly evaluate credibility if faced with evidence that a person had lied in the past.

The primary goal of jury selection "is to empanel an impartial and unbiased jury." *State v. Garcia*, 358 N.C. 382, 407, 597 S.E.2d 724, 743 (2004) (citations omitted). A defendant is entitled to a jury composed of members "free from a preconceived determination to vote contrary to [the defendant's] contention concerning [his] guilt of the offense for which he is being tried." *State v. Williams*, 286 N.C. 422, 427–28, 212 S.E.2d 113, 117 (1975) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)). As an appropriate means to that end, "counsel may question prospective jurors concerning their fitness or competency to serve as jurors to determine whether there is a basis to challenge for cause or whether to exercise a peremptory challenge." *State v. Fullwood*, 343 N.C. 725, 733, 472 S.E.2d 883, 886–87 (1996) (citing N.C. Gen. Stat. § 15A-1214(c) (1988)), *cert. denied*, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997).

Counsel may not, however, "ask questions that use hypothetical evidence or scenarios to attempt to 'stake-out' prospective jurors and cause them to pledge themselves to a particular position in advance of the actual presentation of the evidence." *State v. Fletcher*, 348 N.C. 292, 308, 500 S.E.2d 668, 677 (1998) (citations omitted); *see also State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975) ("Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts."), *sentence vacated on other grounds*, 428 U.S. 902, 96 S. Ct. 3204, 49 L. Ed. 2d 1206 (1976). These "stakeout" questions are improper because they cause a juror "to pledge himself to a decision in advance of the evidence to be presented." *State v. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994) (citing *Vinson*, 287 N.C. at 336, 215 S.E.2d

at 68); *see also State v. Simpson*, 341 N.C. 316, 336, 462 S.E.2d 191, 202 (1995) ("[T]he parties should not be able to elicit in advance what the jurors' decision will be under a certain set of facts. This type of 'staking out' is improper." (citations omitted)). It is also improper for counsel to ask "[q]uestions that seek to indoctrinate prospective jurors regarding potential issues before the evidence has been presented and jurors have been instructed on the law." *State v. Richmond*, 347 N.C. 412, 425, 495 S.E.2d 677, 683–84 (1998) (citing *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989)).

While the law affords counsel "wide latitude" in the *voir dire* of prospective jurors, "the form and extent of the inquiry rests within the sound discretion of the court." *State v. Johnson*, 317 N.C. 343, 382, 346 S.E.2d 596, 618 (1986) (citations omitted). "[T]o show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559 (citations omitted), *cert. denied*, 513 U.S. 891, 115 S. Ct. 239, 130 L. Ed. 2d 162, *reh'g denied*, 513 U.S. 1035, 115 S. Ct. 624, 130 L. Ed. 2d 532 (1994). A defendant's "right to an adequate *voir dire* to identify unqualified jurors does not give rise to a constitutional violation unless the trial court's exercise of discretion in preventing a defendant from pursuing a relevant line of questioning renders the trial fundamentally unfair." *Fullwood*, 343 N.C. at 732–33, 472 S.E.2d at 887 (citing *Morgan v. Illinois*, 504 U.S. 719, 730 n.5, 112 S. Ct. 2222, 2230 n.5, 119 L. Ed. 2d 492, 503 n.5 (1992); *Mu'Min v. Virginia*, 500 U.S. 415, 425–26, 111 S. Ct. 1899, 1905–06, 114 L. Ed. 2d 493, 506 (1991)).

In this case, the trial court sustained several objections by the State to defendant's line of questioning concerning credibility:

> [DEFENSE COUNSEL]: . . . . *People who lie, does that necessarily mean that they lie about everything?*
>
> [PROSECUTOR]: Well, objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: *If you hear testimony . . . about a person lying, does that diminish all their credibility on everything?*
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

> [DEFENSE COUNSEL]: Wish to be heard.
>
> THE COURT: It's a stakeout question so it's sustained.

(Emphasis added.) The trial court later explained: "[M]any of the questions are stakeout questions, a number of which have been objected to and a number of which have not been objected to. Those are impermissible in *voir dire*." In particular, the court expressed concern over defendant's questions which "described a set of facts and then [ ] asked the jurors to indicate how they would view that set of facts."

Before resuming *voir dire*, the court requested that defendant use the pattern jury instructions to guide his line of questioning. The pattern jury instruction on the credibility of a witness provides:

> You are the sole judges of the believability of (a) witness(es).
>
> *You must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of a witness's testimony.*
>
> In deciding whether to believe a witness you should use the same tests of truthfulness that you use in your everyday lives. Among other things, these tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, prejudice or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony is reasonable; and whether the testimony is consistent with other believable evidence in the case.

N.C.P.I.—Crim. 101.15 (2011) (emphasis added).

When compared to the pattern jury instructions, defendant's rejected line of questioning did not "amount[ ] to a proper inquiry as to whether the jury could follow the law or 'whether the juror would be able to follow the trial court's instructions.' " *State v. Hill*, 331 N.C. 387, 404, 417 S.E.2d 765, 772 (1992) (quoting *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980)). Under the pattern instructions, a juror may choose to "believe all, any part, or none of a witness's testimony." N.C.P.I.—Crim. 101.15. Defendant, however, was concerned solely with whether a juror was likely to believe "none of a witness's testimony." He sought to discover what a prospective juror's decision would be under

a set of circumstances—in particular, knowledge that defendant had embezzled money and lied about his health. In other words, defendant attempted to stakeout prospective jurors based on their likelihood to discredit evidence favorable to the defense upon learning that defendant had lied in the past.

The trial court also sustained objections to another, similar line of questioning by defendant:

> [DEFENSE COUNSEL]: *Have you ever known people to lie to get attention?*
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: *Can you consider the possibility that people would lie to get attention, not necessarily people you know?*
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: *Is lying to get attention one of the things that you would consider as a juror in evaluating evidence?*
>
> PROSPECTIVE JUROR NO. 6: Yes.
>
> [DEFENSE COUNSEL]: How about you . . . ?
>
> PROSPECTIVE JUROR NO. 5: Yes.
>
> [DEFENSE COUNSEL]: In evaluating that lie, would you evaluate it not only for whether it is for that or whether it's—whether the lie is logical, whether it makes sense.
>
> [PROSECUTOR]: Objection.
>
> [DEFENSE COUNSEL]: Or it's something someone would expect to be believed?
>
> THE COURT: Sustained.

(Emphasis added.)

The trial court explained, and we agree, that the foregoing questions "tend[ed] to indoctrinate the jury to a particular point of view, which is also not permissible in *voir dire*." Defendant was aware of the State's

intention to offer evidence that defendant had lied about his health on several occasions. His line of questioning indicates an attempt to plant a seed in the minds of prospective jurors—that is, any lie defendant may have told was told to get attention. In their objected form, the questions posed a distinct risk that jurors would be inclined to view the evidence bearing on credibility through the lens provided by defendant at *voir dire*.

In any event, defendant was still "allowed to ask other questions to achieve the same inquiry sought by . . . the questions to which the court sustained the State's objection[s]." *State v. Larry*, 345 N.C. 497, 510, 481 S.E.2d 907, 914 (1997) (citing *State v. Bishop*, 343 N.C. 518, 534–35, 472 S.E.2d 842, 850 (1996), *cert. denied*, 519 U.S. 1097, 117 S. Ct. 779, 136 L. Ed. 2d 723 (1997)). Defendant resumed his line of questioning in a manner consistent with the pattern jury instructions. And as the State points out, several prospective jurors demonstrated a nuanced understanding of how they should evaluate credibility.

Based on the foregoing, we conclude that the trial court did not abuse its discretion by restricting defendant's *voir dire* examination of prospective jurors. The court properly sustained objections to defendant's improper stakeout questions and questions tending to indoctrinate the jurors. In addition, the court did not close the door on defendant's inquiry into whether the prospective jurors could fairly assess credibility. Rather, defendant was permitted to ask similar questions in line with the pattern jury instructions, which were an adequate proxy to gauge a prospective juror's ability to fairly assess credibility at trial.

### C. Exclusion of Custodial Interview Statements

**[3]** Finally, defendant argues that the trial court erred in excluding statements from his custodial interviews on 23 and 25 April 2013, while admitting statements from his third custodial interview on 26 April 2013. In its ruling, defendant contends, the court improperly placed a burden upon defendant to show how the third statement was "out of context," and how the two prior statements were "explanatory or relevant." Although he acknowledges there was no substance to his second statement, as he refused to answer questions during the interview, defendant maintains that his two prior statements should have been admitted under Rule 106 because they would have enhanced the jury's understanding of the third.

Pursuant to Rule 106 of the North Carolina Rules of Evidence, when a party introduces "a writing or recorded statement or part thereof . . . , an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." N.C. Gen. Stat. § 8C-1, Rule 106

(2015). Rule 106 "is an expression of the rule of completeness." *Id.* cmt. (quoting Fed. R. Evid. 106 advisory committee's note). It "codifies the standard common law rule that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted." *State v. Thompson*, 332 N.C. 204, 219–20, 420 S.E.2d 395, 403 (1992). The purpose of the rule "is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot," due to "the inadequacy of repair work when delayed to a point later in the trial." *Id.* at 220, 420 S.E.2d at 403–04 (citations and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 8C-1, Rule 106 cmt. (explaining the two considerations upon which Rule 106 is based).

As *Thompson* instructs, defendant had to demonstrate that the third statement was "somehow out of context" when it was introduced into evidence, and that the two prior statements were "either explanatory of or relevant to" the third. *Thompson*, 332 N.C. at 220, 420 S.E.2d at 404; *see*, *e.g.*, *State v. Castrejon*, 179 N.C. App. 685, 692–93, 635 S.E.2d 520, 524–25 (2006) (holding that the trial court did not err by excluding the defendant's exculpatory statements while admitting testimony that he gave a false name to police, where the defendant failed to show that the testimony "was taken out of context" or the exculpatory statements were "explanatory of or relevant to" the testimony).

We review the trial court's ruling pursuant to Rule 106 for abuse of discretion. *Thompson*, 332 N.C. at 220, 420 S.E.2d at 403 (citation omitted); *see also State v. Fowler*, 353 N.C. 599, 620, 548 S.E.2d 684, 699 (2001) ("[W]hether evidence should be excluded . . . under the common law rule of completeness codified in Rule 106 is within the trial court's discretion." (citations omitted)).

Contrary to defendant's assertion, the trial court correctly applied Rule 106 in its decision to exclude the first two statements at trial. After reviewing all three recorded statements and comparing the contents thereof, the court concluded that defendant made no statement during the first or second interview "that under Rule 106 ought, in fairness, to be considered contemporaneously with the statements of April 26." The court found "no instance where the statements in the April 26 interview require further explanation by any excerpts from the April 23 or the April 25 interview," and "no instance where the statements in the [April 26] interview were rendered out of context or misleading in the absence of excerpts from the April 23 or April 25 interview." Defendant harps on the "temporal connection and interrelated nature" of the statements but

fails to explain precisely how the first two statements would "enhance the jury's understanding" of the third. And upon our review of the interview transcripts, we conclude defendant has failed to show that the court abused its discretion in excluding defendant's first two statements at trial.

## III. Conclusion

Defendant received a fair trial, free from error. The trial court properly concluded that Dr. Hamra's proffered testimony constituted expert opinion testimony which defendant failed to disclose pursuant to the reciprocal discovery order. Even if Dr. Hamra was testifying as a lay witness, the court acted within the bounds of its discretion by excluding his testimony under Rule 403 in that the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. The court exercised the same, appropriate level of discretion at jury selection by sustaining the State's objections to questions designed to stakeout and indoctrinate prospective jurors, and by restricting defendant's *voir dire* to a proper inquiry in line with the pattern instructions on witness credibility. Finally, we conclude that the trial court did not abuse its discretion by excluding defendant's two prior interview statements from evidence at trial. Our review of the two prior interview transcripts reveals no statement which, in fairness, should have been considered contemporaneously with the third.

NO ERROR.

Judges TYSON and BERGER concur.

**STATE v. COLEMAN**

[254 N.C. App. 497 (2017)]

STATE OF NORTH CAROLINA
v.
MATTHEW ANDREW COLEMAN

No. COA16-1150

Filed 18 July 2017

**1. Homicide—voluntary manslaughter—directed verdict denied—automatism defense—low blood sugar**

The trial court did not err by denying defendant's motion for a directed verdict for a charge of voluntary manslaughter for killing his wife where defendant's sole defense of automatism (due to his low blood sugar) was refuted by the State's expert, thus allowing the jury to conclude that defendant intentionally shot and killed his wife. Any error in the denial of directed verdict for the murder charges was not prejudicial where the jury only convicted defendant of voluntary manslaughter.

**2. Evidence—expert testimony—amount paid for testifying—relevancy—partiality—"fact of consequence"**

The trial court did not commit prejudicial error in a voluntary manslaughter case by allowing the State to question defendant's expert witness regarding the amount of fees the expert received for testifying in other unrelated criminal cases where the challenged evidence was relevant to test partiality towards the party by whom the expert was called. The fact that an expert witness may have a motive to testify favorably for the party calling him is a "fact of consequence" to the jury's assessment of that witness's credibility.

**3. Evidence—expert testimony—state of mind—low blood sugar—automatism—hypoglycemia**

The trial court did not commit prejudicial error in a voluntary manslaughter case by allowing the State's expert witness to testify about defendant's state of mind at the time he shot his wife where defendant used the defense of automatism (based on his low blood sugar) as justification. The expert was an endocrinologist whose expertise included automatism primarily as it related to responsibility in driving motor vehicles and collisions by those suffering from hypoglycemia.

**4. Jury—jury instruction—defense of automatism—pattern jury instructions**

The trial court did not commit plain error in a voluntary manslaughter case by its instructions to the jury on the defense of

automatism where the trial court used almost verbatim the pattern jury instructions.

**5. Homicide—voluntary manslaughter—failure to instruct on lesser-included offense—involuntary manslaughter**

The trial court did not commit plain error in a voluntary manslaughter case by failing to instruct the jury on the lesser-included offense of involuntary manslaughter where there was no evidence at trial suggesting that defendant did not intend to shoot his wife.

Appeal by defendant from judgment entered 14 December 2015 by Judge J. Thomas Davis in Clay County Superior Court. Heard in the Court of Appeals 24 May 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for the State.*

*Parker Law Firm, PC, by James V. Parker, Jr., for defendant.*

DIETZ, Judge.

Defendant Matthew Coleman appeals his conviction for voluntary manslaughter. At trial, Coleman admitted that he shot and killed his wife. But he argued that, as a result of diabetes, his blood sugar was dangerously low at the time of the shooting, causing Coleman to act in a manner that was not voluntary.

On appeal, Coleman challenges the sufficiency of the evidence and argues that the trial court committed plain error in various evidentiary and instructional rulings. As explained below, there was sufficient evidence to send the charge of voluntary manslaughter to the jury and the trial court's rulings were well within the court's sound discretion. Accordingly, we find no error in the trial court's judgment.

## Facts and Procedural History

On 22 April 2013, Matthew Coleman and his wife went to the grocery store and returned home around 1 p.m. Soon after, Coleman's neighbor, Barbara Hardee, observed Coleman walking toward her house carrying three briefcases and an unidentified object. Coleman dropped the object (later discovered to be a gun) in a brush pile in the yard. Coleman then approached Ms. Hardee's house and told her that he killed his wife. Ms. Hardee told Coleman not to "kid that way," but Coleman responded, "I'm not kidding, didn't you hear the shot?"

Ms. Hardee called 911 while her husband, Roland Hardee, checked Coleman for weapons. Mr. Hardee was concerned about Coleman's blood sugar level and gave Coleman a granola bar. Mr. Hardee asked Coleman why he shot his wife and Coleman responded, "I don't know, something told me." When Mr. Hardee asked Coleman if it was an accident, Coleman stated "I just went to get my gun and couldn't find it, then I just shot her."

Police and EMS were dispatched and arrived at approximately 1:40 p.m. In their initial investigation, law enforcement determined that Coleman shot his wife, picked up three briefcases and the gun, locked the house, walked past his truck, threw the gun into a brush pile, and then approached Ms. Hardee and told her that he shot his wife. In the three briefcases, the police found approximately $110,000 in cash, savings bonds, and foreign currency, and various important documents. Coleman told a police officer that "he didn't know why he had done it, why did he kill the woman he loved, they had plans together, plans he made." Coleman also said, "Why did I kill the woman I loved? We never fought in 30 years. We had plans together, plans I made. How could I do such a horrible thing?" Coleman then told the officer that his blood sugar was dropping.

On 31 May 2013, the State indicted Coleman for first degree murder. Coleman entered a plea of not guilty and gave notice of his intent to assert the affirmative defense of automatism based on his low blood sugar at the time of the shooting. Coleman was diagnosed as a Type I diabetic in 1981 and had a history of hypoglycemic episodes where his blood sugar dropped to very low levels. The evidence presented at trial included a glucometer reading of 39 from 1:22 p.m. on 21 April 2013, along with a handwritten log of corresponding glucose readings indicating that the glucometer's date stamps may have been one day behind, meaning the 39 reading could have been recorded the day Coleman shot his wife.

At trial, Coleman presented expert testimony from Dr. George Corvin, a psychiatrist Coleman retained to evaluate him. Dr. Corvin testified that, in his opinion, Coleman was acting in a state of automatism due to hypoglycemia when he shot his wife. On cross-examination, over Coleman's objection, the State questioned Dr. Corvin about the amount of fees he was paid to testify as a defense expert in criminal cases from 2013-2015.

The State presented expert testimony from Dr. Warner Burch, an endocrinologist, who testified that in his opinion, Coleman was not in a

state of automatism due to hypoglycemia at the time of the offense. This testimony was admitted over Coleman's objection to Dr. Burch giving an opinion as to Coleman's state of mind.

The jury found Coleman guilty of the lesser-included offense of voluntary manslaughter. The trial court sentenced Coleman to 64-89 months in prison. Coleman timely appealed.

## Analysis

Coleman raises five issues on appeal. We address each in turn below.

### I. Denial of motion for directed verdict

**[1]** Coleman first argues that the trial court erred by denying his motion for a directed verdict of not guilty because the State failed to present evidence of all of the required elements of first degree murder and the lesser-included offenses of second degree murder and voluntary manslaughter. We disagree.

In a criminal case, a motion for directed verdict and a motion to dismiss have the same effect and are reviewed under the same standard of review on appeal. *See State v. Mize*, 315 N.C. 285, 290, 337 S.E.2d 563, 565 (1985). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Although Coleman argues that the trial court erred in denying his motion for directed verdict on all of the charges, the jury found Coleman not guilty of the greater offenses of first and second degree murder, convicting him only of voluntary manslaughter. Therefore, any error in the denial of Coleman's motion as to the murder charges is not prejudicial and we need only address his argument as to the voluntary manslaughter charge. *See* N.C. Gen. Stat. § 15A-1443(a).

"Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation." *State v. Norris*, 303 N.C. 526, 529, 279 S.E.2d 570, 572 (1981). Voluntary manslaughter requires the State to prove two elements: "(1) Defendant killed [the victim] by an intentional and unlawful act and (2) Defendant's act was the proximate cause of [the victim's] death." *State v. English*, 241 N.C. App. 98, 105, 772 S.E.2d 740, 745 (2015); *see also* N.C.P.I. – Crim. 206.13.

Coleman argues that the trial court should have granted his motion for directed verdict on the voluntary manslaughter charge because "no evidence was presented by the State to even suggest that [Coleman] acted in the heat of passion." We reject this argument because acting in the "heat of passion" is not an essential element of voluntary manslaughter. To be sure, evidence that a defendant acted in the heat of passion can negate the malice element required for the greater offenses of first or second degree murder. *See State v. Rainey*, 154 N.C. App. 282, 288, 574 S.E.2d 25, 29 (2002). But to prove voluntary manslaughter, the State need not prove that the defendant acted in the heat of passion; instead, the State must prove only that the defendant killed the victim by an intentional and unlawful act and that the defendant's act was a proximate cause of the victim's death.

Here, the State presented evidence showing that Coleman shot his wife and admitted that he shot her. His sole defense was that he did not act voluntarily due to his low blood sugar, which placed him in a state of automatism. The State presented admissible expert testimony that Coleman was not in a state of automatism when he shot his wife. Thus, there was substantial evidence from which a reasonable jury could reject Coleman's automatism defense and conclude that Coleman intentionally shot and killed his wife—the only elements necessary to prove voluntary manslaughter. Accordingly, the trial court properly denied Coleman's motion.

## II. Cross-examination of Coleman's expert witness regarding fees

**[2]** Coleman next argues that the trial court committed plain error by allowing the State to question his expert witness, Dr. George Corvin, regarding the amount of fees Dr. Corvin received for testifying in other, unrelated criminal cases. Coleman argues that the question was not relevant and thus was inadmissible.

As an initial matter, although Coleman asserts that this was plain error (the standard of review for unpreserved evidentiary challenges), Coleman's counsel timely objected to this line of questioning at trial by

stating "objection, relevance." We therefore review it for ordinary prejudicial error, rather than the more onerous standard for plain error.

This Court reviews a ruling on relevance de novo, but affords the trial court "great deference" on appeal. *State v. Capers*, 208 N.C. App. 605, 615, 704 S.E.2d 39, 45 (2010). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401.

Applying this definition, we hold that the challenged evidence was relevant to "test partiality towards the party by whom the expert was called." *State v. Cummings*, 352 N.C. 600, 620, 536 S.E.2d 36, 51 (2000). From the large sums of money that Coleman's expert earned by testifying solely on behalf of criminal defendants, a reasonable jury could infer that the expert had an incentive to render opinions favorable to the criminal defendants who employ him. As our Supreme Court has observed, this inference readily can be addressed and rebutted on redirect, for example through the expert's testimony that his fees are consistent with those charged by others with similar levels of specialized knowledge and expertise. *State v. Brown*, 335 N.C. 477, 493, 439 S.E.2d 589, 599 (1994). Moreover, in appropriate cases, a court might exclude this testimony because it is substantially more prejudicial than probative. But as to the threshold question of relevance, the fact that an expert witness may have a motive to testify favorably for the party calling him certainly is a "fact of consequence" to the jury's assessment of that witness's credibility. Thus, the challenged testimony was relevant and the trial court did not err in overruling Coleman's relevancy objection.

**III. Expert testimony concerning Coleman's state of mind**

**[3]** Coleman next contends that the trial court committed plain error by allowing Dr. Burch, the State's expert witness, to testify to Coleman's state of mind at the time of the shooting. Coleman argues that this testimony fell outside the permissible range of Dr. Burch's expert testimony.

Again, we note that although Coleman asserts plain error, his counsel timely objected to the challenged testimony, preserving this issue for appellate review. We therefore review it for prejudicial error, rather than the more onerous standard for plain error.

"The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005). "Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible.

First, the area of proposed testimony must be based on scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue." *State v. McGrady*, 368 N.C. 880, 889, 787 S.E.2d 1, 8 (2016). "Second, the witness must be qualified as an expert by knowledge, skill, experience, training, or education." *Id.* at 889, 787 S.E.2d at 9. "Third, the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case." *Id.* at 890, 787 S.E.2d at 9.

Here, Dr. Burch, an endocrinologist, testified that, based on his experience with hypoglycemia and his review of Coleman's medical records and accounts of what had occurred the day of the shooting, Coleman's actions were "not caused by automatism due to hypoglycemia. Automatism due to hypoglycemia is possible but not probable given the bulk of the evidence." Dr. Burch testified that he reached this opinion largely because Coleman did not experience any amnesia which, in Dr. Burch's experience, is one of the characteristic features of automatism caused by hypoglycemia.

Coleman argues that this testimony, while couched as expert medical testimony, is merely speculation about Coleman's state of mind at the time of the shooting. We disagree. Dr. Burch is an endocrinologist whose expertise includes "automatism primarily as it relates to responsibility in driving motor vehicles and collisions by those suffering from hypoglycemia." The trial court properly found that Dr. Burch was an expert in the signs and symptoms that accompany automatism caused by hypoglycemia and that his testimony was based on sufficient data and facts using "well documented and accepted principles and methods in the field of endocrinology."

Applying that expertise, Dr. Burch testified that, in his opinion, Coleman was not in a state of automatism when he shot his wife because he did not suffer from amnesia, a key characteristic of the condition. The trial court acted well within its sound discretion in admitting this expert testimony. *See McGrady*, 368 N.C. at 893, 787 S.E.2d at 11.

## IV. Jury instruction on defense of automatism

**[4]** Coleman next argues that the trial court committed plain error in its instructions to the jury on the defense of automatism.

We agree that Coleman failed to preserve this error for appellate review and thus we review solely for plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

Coleman contends that the jury instruction was misleading because it implied that Coleman had to prove the defense of automatism beyond a reasonable doubt. As explained below, we reject this argument.

The trial court instructed the jury on the defense of automatism using the North Carolina Pattern Jury Instructions. The court instructed the jury:

> You may find there is evidence which tends to show that the defendant was physically unable to control his physical actions because of automatism or unconsciousness; that is a state of mind in which a person, though capable of action, is not conscious of what the person is doing at the time the crime was alleged to have been committed.
>
> In this case, one element that the State must prove beyond a reasonable doubt is that the act charged be done voluntarily. Therefore, unless you find from the evidence beyond a reasonable doubt that at the time the defendant was able to exercise conscious control of the defendant's physical actions, the defendant would be not guilty of the crime.
>
> *If the defendant was unable to act voluntarily the defendant would not be guilty of any offense.*
>
> The burden of persuasion rests on the defendant to establish this defense to the satisfaction of the jury. However, unlike the State, which must prove all the other elements beyond a reasonable doubt, *the defendant need only prove the defendant's unconsciousness to your satisfaction. That is, the evidence taken as a whole must satisfy you, not beyond a reasonable doubt but simply to your satisfaction*, that defendant was unconscious at the time of the alleged offense.

(Emphasis added). The trial court then instructed the jury on each charge and explained that if the jury found "beyond a reasonable doubt" that Coleman met all the elements of the particular offense, "it would be your duty to return a verdict of guilty . . . unless you are satisfied that the defendant was not guilty by reason of unconsciousness." And finally, the court concluded its instructions with, "If you do not so find or have a reasonable doubt as to one or more of these things, or if you are satisfied that the defendant was not guilty by reason of unconsciousness, it would be your duty to return a verdict of not guilty."

These instructions accurately stated the law. As an initial matter, the instructions are almost entirely a verbatim recitation of the pattern jury instructions, which this Court has held is the preferred manner of instructing the jury on all issues. *Henry v. Knudsen*, 203 N.C. App. 510, 519, 692 S.E.2d 878, 884 (2010). Moreover, even where these instructions depart from the pattern instructions, they accurately state the law. The instructions explained the proper burden of proof for the defense of automatism as well as the principle that if the jury found that Coleman had met his burden of proving the defense then he would not be guilty of any crime. The instructions explicitly stated that Coleman's burden was "to establish this defense to the satisfaction of the jury" and that "unlike the State, which must prove all the other elements beyond a reasonable doubt, *the defendant need only prove the defendant's unconsciousness to your satisfaction*." (Emphasis added). The instructions also explicitly stated that "[i]f the defendant was unable to act voluntarily *the defendant would not be guilty of any offense*." (Emphasis added). Finally, the instructions on each of the charged offenses indicated that a finding of unconsciousness or automatism would require a verdict of not guilty.

Accordingly, we hold that the trial court's jury instructions on automatism, considered in context, were a correct statement of the law. We therefore find no error and certainly no plain error.

## V. Omission of involuntary manslaughter from jury charge

**[5]** Finally, Coleman argues that the trial court committed plain error by not instructing the jury on the lesser-included offense of involuntary manslaughter. This argument is not preserved for appellate review and thus is subject to the plain error standard described above.

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). In the context of a shooting, the charge of involuntary manslaughter requires evidence of "the

absence of intent to discharge the weapon." *State v. Robbins*, 309 N.C. 771, 779, 309 S.E.2d 188, 192 (1983). This distinguishes involuntary manslaughter from its voluntary counterpart, which requires proof of intent.

Coleman's argument fails because there was no evidence at trial suggesting that Coleman did not intend to shoot his wife. Coleman's defense relied on his argument that he was in a state of automatism—a complete defense to all criminal charges. The jury rejected that defense. Setting automatism aside, there is no evidence suggesting the shooting was an accident. Accordingly, we find no error in the trial court's failure to instruct the jury on the lesser-included offense of involuntary manslaughter.

**Conclusion**

For the reasons discussed above, we find no error in the trial court's judgment.

NO ERROR.

Chief Judge McGEE and Judge MURPHY concur.

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STATE OF NORTH CAROLINA
v.
DARIUS TERRELL HESTER

No. COA16-1120

Filed 18 July 2017

**1. Criminal Law—plain error review—invited error**

The trial court's denial of defendant's motion to suppress based on alleged lack of reasonable suspicion for a traffic stop was properly before the Court of Appeals based on plain error review where defendant was required to defend against the charges of attempted murder and felonious possession of a stolen firearm by testifying about the circumstances surrounding his possession of the stolen handgun.

**2. Search and Seizure—stolen firearm—motion to suppress—separate crime—intervening event—causal link—unlawful stop**

The trial court did not commit plain error in a felonious possession of a stolen firearm case by denying defendant's motion to suppress where evidence of a recovered stolen handgun was obtained

after defendant committed the separate crime of pointing a loaded gun at an officer and pulling the trigger. The State presented a sufficient intervening event to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun.

**3. Appeal and Error—preservation of issues—attenuation—burden of proof on other party—appellate rules—intervening event**

The trial court did not commit plain error in a felonious possession of a stolen firearm case by allowing into evidence a stolen and loaded handgun even presuming the State failed to preserve an attenuation issue for review where the burden was on defendant to show error in the lower court's ruling. Alternatively, the Court of Appeals ruled to invoke N.C. R. App. P. 2 to suspend the alleged requirements of N.C. R. App. P. 10 to allow it to consider the State's attenuation argument to prevent manifest injustice. The State presented a sufficient intervening event to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun.

Judge DILLON concurring in separate opinion.

Chief Judge McGEE dissenting.

Appeal by defendant from judgment entered 1 April 2016 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 20 April 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.*

TYSON, Judge.

Darius Terrell Hester ("Defendant") appeals from his conviction of felonious possession of a stolen firearm following the trial court's denial of his motion to suppress. Due to Defendant's failure to object at trial, this issue is properly before us solely upon plain error review. Defendant has failed to carry his burden to show error or plain error in the jury's verdict or the judgment entered thereon.

I. Background

New Hanover County Sheriff's Deputy Joshua Cranford was familiar with the Rockhill Road area in Wilmington, as he regularly patrolled that area as part of his patrol route. He described the area as having a history of criminal gang and drug activity. Deputy Cranford testified a recent home invasion had occurred in the area and numerous "break-ins" in the past. He had personally made one arrest for home invasion. He was unable to specifically recall making any arrests for breaking and entering or drug activity in the area. Deputy Cranford testified that officers generally share information with each other about areas where criminal activity is afoot and crimes are committed.

New Hanover County Sheriff's Detective Kenneth Murphy had served as a law enforcement officer for seventeen years. He also testified about criminal activity in the Rockhill Road area. Three homicides occurred in the neighborhood between 1999 and 2003. Detective Murphy testified the area was "known for" breaking and entering, drug activity, and drive-by shootings. He was unaware of when the most recent breaking and entering crimes had occurred prior to 16 August 2013.

At around 10:30 a.m. on Friday, 16 August 2013, Deputy Cranford was patrolling the area in his marked patrol car and turned onto Rockhill Road. He was unaware of whether any crimes had been committed in the area that morning or the previous night. After driving approximately one-half mile on Rockhill Road, Deputy Cranford noticed a car was pulled over toward the side of the road, but was partially parked on the travel lane of the roadway. He initially believed the car might be disabled. As Deputy Cranford's marked patrol car approached the front of the parked vehicle and came within fifty yards of the vehicle, it moved and the driver drove away "in a normal fashion."

When the car pulled away, Deputy Cranford "saw [Defendant] walk away from the vehicle and cross the road in front of [him] and continue up Rockhill Road in the opposite direction." Deputy Cranford did not know whether Defendant had gotten out of the car or had been speaking with anyone inside the car.

Deputy Cranford also testified he believed the car had pulled away and Defendant had crossed the road in reaction to his arrival and presence. He further testified he did not know "if [Defendant] was lost," or whether a drug deal had just occurred. He believed Defendant may have been dropped off on the road in order to break into people's homes.

Deputy Cranford testified he "wanted to get outside and investigate and make sure everything was okay," because of the "area that we were

in" and the fact that Defendant walked from the car and the car pulled away as he approached. Deputy Cranford turned his vehicle around, activated his blue lights, and stopped Defendant.

Deputy Cranford exited his patrol car and asked Defendant whether he possessed any drugs or weapons. Defendant responded that he did not. Deputy Cranford asked Defendant for identification. Defendant did not possess a photo identification, but gave Deputy Cranford his name and date of birth. Defendant was initially polite and cooperative. He asked Deputy Cranford if he had done anything wrong. Deputy Cranford responded that he had not done anything wrong.

Deputy Cranford asked Defendant to remain at the front of his patrol car while he sat inside his patrol car. Deputy Cranford contacted the Sheriff's dispatcher to determine whether Defendant had any outstanding arrest warrants.

Defendant walked from the front of the patrol car to the driver's side and "stood [at] the entrance of the car door," which made Deputy Cranford "uncomfortable." Deputy Cranford instructed Defendant to return to the front of the patrol car. Moments later, Defendant "tried to do the same thing again." At that point, Deputy Cranford exited his patrol car, stood at the front of the car with Defendant, and awaited a response from the Sheriff's dispatcher. The Sheriff's dispatcher informed Deputy Cranford that Defendant had no outstanding warrants, but that he was "known to carry" a concealed weapon based upon a prior charge for carrying a concealed weapon.

Deputy Cranford again asked Defendant whether he possessed a weapon. Defendant lied and responded that he did not. At that point, Deputy Cranford observed a slight bulge under Defendant's shirt. Defendant became confrontational when Deputy Cranford asked him to lift his shirt. Defendant lifted his shirt and pulled a handgun from his waistband. Deputy Cranford testified that Defendant pointed the gun at him and pulled the trigger. He heard the hammer click, but the weapon did not discharge.

Deputy Cranford testified he backed up and drew his weapon. He began to fire shots at Defendant, who fled while still carrying his handgun. Deputy Cranford chased Defendant down a dirt path and lost sight of him as Defendant rounded a corner. Deputy Cranford turned the corner and saw Defendant lying on the ground. Defendant had been shot in the shoulder. Defendant told Deputy Cranford he had dropped his gun. Deputy Cranford placed Defendant under arrest.

Deputy Cranford recovered Defendant's handgun in the dirt path about twenty yards away. The recovered gun was found to be loaded with a full clip and it had been reported as stolen from a home in Wilmington in 2013. At trial, Defendant testified he had bought the gun "from off the streets" and that he knew such guns were typically stolen.

Defendant was indicted and tried on the charges of attempted murder and possession of a stolen firearm. Defendant testified he did not point the gun at Deputy Cranford or pull the trigger. He stated he was attempting to hand Deputy Cranford the gun, with the barrel pointed toward the ground.

Defendant testified Deputy Cranford reacted with shock and reached for his weapon. Defendant ran. He stated he was holding the handgun when he ran, but threw it prior to being shot. Defendant was acquitted of the attempted murder charge. The jury found him to be guilty of possession of a stolen firearm. Defendant appeals.

## II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

## III. Standard of Review and Defendant's Preservation of Error

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)).

**[1]** Defendant's motion to suppress was heard prior to trial. The trial court denied the motion immediately following the presentation of evidence and arguments of counsel. Defendant concedes defense counsel failed to object when the evidence resulting from the stop, and particularly the stolen handgun, was offered at trial. The admission of the handgun evidence must be reviewed for plain error. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000) (holding a motion *in limine* is insufficient "to preserve for appeal the question of admissibility of evidence if the defendant did not object to the evidence at the time it was offered at trial"), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

At trial, Defendant failed to object to numerous references to his possession of the stolen handgun, or to object to the tender and admission of the handgun into evidence. During his testimony, Defendant

acknowledged he had purchased and possessed the stolen handgun, but denied pointing it at Deputy Cranford or pulling the trigger.

The State argues Defendant elicited the same evidence and testified at trial, and is not entitled to plain error review, because he invited the error. *See* N.C. Gen. Stat. § 15A-1443(c) (2015) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."). The State cites *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008) ("Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law.").

Once the trial court denied Defendant's motion to suppress based upon lack of reasonable suspicion for the stop, Defendant was required to defend against the charges of attempted murder and felonious possession of a stolen firearm. He defended the charges by testifying about the circumstances surrounding his possession of the stolen handgun. This testimony was subject to cross-examination by the State.

While defending against the attempted murder charge, Defendant testified to explain his actions of surrendering the weapon and stated he did not point or fire his gun at Deputy Cranford. A defendant does not waive an objection to evidence by seeking "to explain, impeach or destroy its value." *State v. Badgett*, 361 N.C. 234, 246, 644 S.E.2d 206, 213 (citation omitted), *cert. denied*, 552 U.S. 977, 169 L. Ed. 2d 351 (2007). Defendant's appeal from the denial of his motion to suppress is properly before us on plain error review, and not invited error. *See id.*

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). This burden rests upon Defendant. *See id.*

## IV. Denial of Defendant's Motion to Suppress

**[2]** Defendant's sole argument on appeal asserts the trial court erred by denying his motion to suppress the evidence obtained from the stop. Defendant argues Deputy Cranford did not possess a reasonable suspicion that he was involved in criminal activity when Deputy Cranford initially stopped and questioned him.

### A. Fourth Amendment Protections

The United States and North Carolina Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const.

art. I, § 20. The protections of the Fourth Amendment apply "to seizures of the person, including brief investigatory detentions." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (citing *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893 (1980)). A "seizure" has occurred under the Fourth Amendment when an officer uses a "show of authority" to stop a citizen. *Florida v. Royer*, 460 U.S. 491, 501-02, 75 L. Ed. 2d 229, 239 (1983). "[T]he crucial test [to determine if a person is seized] is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991) (citation and quotation marks omitted).

Here, Deputy Cranford turned his vehicle around and activated his blue lights after arrival upon the scene. Defendant stopped walking and voluntarily talked with Deputy Cranford. Defendant failed to provide a photo identification to the officer, but provided his name and address. The trial court properly analyzed this encounter as a stop. The State does not contest that Defendant was seized to implicate the Fourth Amendment. A reasonable person would not have felt at liberty to ignore Deputy Cranford's presence and the use of blue lights on his marked vehicle, and continue to walk away. *See id.*

To survive Fourth Amendment scrutiny, an investigatory stop must be justified by "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979) (citations omitted). As applied by the Supreme Court of North Carolina: "A court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists" to justify an officer's investigatory stop. *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012) (citation and quotation marks omitted).

"The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Watkins*, 337 N.C. at 441-42, 446 S.E.2d at 70 (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)); *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, (1989)).

At the conclusion of the suppression hearing, the trial court recited the evidence presented, as detailed above, and stated:

> The Court concludes as a matter of law that the Court takes into consideration the officer's personal observations at the time that he observed a vehicle and the defendant on Rockhill Road, that it was – that it is a high crime area where several breaking and enterings, drug activity, and drive-by shootings have occurred in the past; and that Deputy Cranford did not have all this information himself as he had not himself made several arrests for breaking and enterings or the activity in that area, that the officers shared this information and that Deputy Cranford would receive updates of information about the area in which he was patrolling on a regular basis when he was on duty.
>
> Therefore, the Court does find that the officer did have reasonable suspicion to believe that a crime was being committed at the time that he stopped the defendant on Rockhill Road. Therefore, the Court is going to deny the motion to suppress the evidence.

B. Intervening Circumstance

Even if this Court were to accept Defendant's argument that Deputy Cranford's initial stop of Defendant was not based upon a reasonable suspicion that Defendant was involved in criminal activity, the trial court's ultimate ruling on Defendant's motion to suppress to allow admission of the stolen handgun is properly upheld.

Viewed in the light most favorable to the State and under plain error review, evidence presented to the trial court at the hearing on Defendant's motion to suppress showed the recovered stolen handgun and all evidence related to the stolen handgun were obtained *after Defendant's commission of a separate crime*: pointing a loaded, stolen gun at Deputy Cranford and pulling the trigger. At the suppression hearing, the trial court expressly found Defendant pointed the gun at the officer and pulled the trigger.

Evidence discovered as a result of an illegal search or seizure is generally excluded at trial. *See Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963). "[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure and, relevant here, evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.' "

*Utah v. Strieff*, __ U.S. __, __, 195 L. Ed. 2d 400, 407 (2016) (quoting *Segura v. United States*, 468 U.S. 796, 804, 82 L. Ed. 2d 599, 608 (1984)). However,

> [w]e need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead *by means sufficiently distinguishable to be purged of the primary taint.*

*Wong Sun*, 371 U.S. at 487-88, 9 L. Ed. 2d at 455 (citation and quotation marks omitted) (emphasis supplied). The Supreme Court of the United States has deemed the exclusionary rule " 'applicable only . . . where its deterrence benefits outweigh its substantial social costs.' " *Strieff*, __ U.S. at __, 195 L. Ed. 2d at 407 (quoting *Hudson v. Michigan*, 547 U. S. 586, 591, 165 L. Ed. 2d 56 (2006)).

"Suppression of evidence has always been our last resort, not our first impulse." *Id.* (ellipsis and citation omitted). Guided by these principles, the Supreme Court of the United States has recognized several exceptions to the exclusionary rule.

> First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. *Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.*

*Id.* (internal citations and quotation marks omitted) (emphasis supplied). We address the third exception, and hold the State presented a sufficient intervening event to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun. *See id.*

This Court can conceive only in the most rare instances "where [the] deterrence benefits" of police conduct to suppress a firearm "outweigh[s]

its substantial social costs" of preventing a defendant from carrying a concealed, loaded, and stolen firearm, pulling it at an identified law enforcement officer and pulling the trigger. *See Hudson*, 547 U. S. at 591, 165 L. Ed. 2d at 64 (citation and quotation marks omitted).

1. Preservation

**[3]** We initially address the dissenting opinion's notion that the State's "attenuation doctrine" argument must be dismissed, because the State failed to present that specific argument to the trial court during the hearing on Defendant's motion to suppress.

Defendant argued before the trial court that Deputy Cranford stopped him without reasonable suspicion of criminal activity, and Deputy Cranford's order to Defendant to lift his shirt, which revealed the handgun, constituted an unlawful search. Our review of the transcript of the hearing and record shows the State did not use the words "intervening circumstance" or "attenuation," and argued to the trial court that Deputy Cranford had reasonable suspicion to stop Defendant. The trial court denied Defendant's motion to dismiss on the basis that Deputy Cranford possessed reasonable suspicion to stop Defendant.

We are bound by precedents to conclude this issue is properly before us. It is well-settled in North Carolina that "[t]he question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable. The crucial inquiry for this Court *is admissibility and whether the ultimate ruling was supported by the evidence*." *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (quoting *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987)) (emphasis supplied).

" '[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned.' " *State v. Dewalt*, 190 N.C. App. 158, 165, 660 S.E.2d 111, 116 (quoting *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)), *disc. review denied*, 362 N.C. 684, 670 S.E.2d 906 (2008).

The burden on appeal rests upon Defendant to show the trial court's ruling is incorrect. *See State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988). The occurrence of an intervening event, which purges the taint of an illegal stop, becomes an issue only if the court finds the underlying illegality.

The intervening event does not present an arguable issue until the trial court determines the defendant sustained his burden of persuasion on the illegality of the police conduct. While the State could have

requested the trial court's consideration of the attenuation issue as an alternative basis to admit the handgun, the State's failure to raise the attenuation issue at the hearing does not compel nor permit this Court to summarily exclude the possibility that the trial court's ruling was correct under this or some other doctrine or rationale. *See Bone*, 354 N.C. at 8, 550 S.E.2d at 486; *Blackwell*, 246 N.C. at 644, 99 S.E.2d at 869.

The dissenting opinion notes the well-established trot that "the law does not permit parties to swap horses between courts in order to get a better mount." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). However, those cases and all others cited only apply to instances where the party, whether Plaintiff, Defendant, or the State, is carrying the burden on appeal to show error in the lower court's ruling on appeal, and relies upon a theory not presented before the lower court.

That circumstance is not before us here. We review the trial court's ultimate ruling for error, prejudice, and, in this case, *solely* for plain error. This Court is free to and may uphold the trial court's "ultimate ruling" based upon a theory not presented below or even argued here. *See Bone*, 354 N.C. at 8, 550 S.E.2d at 486.

Our precedents clearly allow the party seeking to *uphold* the trial court's presumed-to-be-correct and "ultimate ruling" to, in fact, choose and run any horse to race on appeal to sustain the legally correct conclusion of the order appealed from. *See id.*; *Austin*, 320 N.C. at 290, 357 S.E.2d at 650; *Blackwell*, 246 N.C. at 644, 99 S.E.2d at 869.

The dissenting opinion relies upon this Court's decision in *State v. Gentile*, 237 N.C. App. 304, 766 S.E.2d 349 (2014). *Gentile* is easily distinguishable from the circumstances presented here. In *Gentile*, the State sought to overturn the trial court's ruling, which granted the defendant's motion to suppress. This Court did not allow the State, *who bore the burden on appeal* to show error in the trial court's presumably correct ruling, to "swap horses" on appeal. *Id.* at 310, 766 S.E.2d at 353-54. For the same reason, this Court routinely dismisses arguments advanced by defendants in criminal cases when the defendants attempt to mount and ride a stronger or better, and possibly prevailing steed not run before the trial court.

Rule 10 of our Rules of Appellate Procedure governs the preservation of issues during trial proceedings. N.C. R. App. P. 10. Our conclusion that the trial court did not commit plain error to allow into evidence the stolen and loaded handgun does not change, even if we were to presume the State failed to preserve the attenuation issue for our review.

Alternatively, we rule to invoke Rule 2 in this case to suspend the dissent's alleged requirements of Rule 10 to allow us to consider the State's attenuation argument.

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2.

This matter involves "exceptional circumstances [and] significant issues of importance in the public interest," the firing of a stolen and loaded weapon upon a police officer by a private citizen illegally carrying a weapon. Defendant was not prejudiced by the State's failure to make the attenuation argument below. The State presented evidence at the suppression hearing that Defendant fired upon the officer, which Defendant had the opportunity to rebut.

The trial court specifically found that Defendant attempted to fire at the officer when it rendered its ruling on Defendant's motion to suppress. Further, we note Defendant argues denial of his suppression motion on appeal, under plain error review, even though he failed to properly preserve his objection when the evidence was introduced and commented on multiple times at trial. Even if the State failed to properly preserve the attenuation argument in the trial court for our review, the circumstances in this case alternatively compel us to invoke Rule 2 and also review the merits of the State's arguments to uphold the trial court's ultimate ruling in its order. This issue is properly before us.

2. Commission of a Crime

To determine whether an intervening event is sufficient to break "the causal chain between the unlawful stop and the discovery of the [evidence]," the Supreme Court of the United States has delineated the following three factors: (1) "the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search;" (2) "*the presence of intervening circumstances*;" and (3) "the purpose and flagrancy of the official misconduct." *Strieff*, __ U.S. at __, 195 L. Ed. 2d at 408 (emphasis supplied). "In evaluating these factors, we assume without deciding . . . that [the officer] lacked reasonable suspicion to initially stop [the defendant]." *Id.*

Here, the evidence presented in the light most favorable to the State at the suppression hearing showed after Deputy Cranford was warned Defendant might be carrying a concealed weapon, noticed a bulge in Defendant's waist, and asked Defendant to lift his shirt, Defendant responded by: (1) raising his shirt; (2) pulling a loaded and stolen handgun from his waistband; (3) pointing the gun at Deputy Cranford; and (4) pulling the trigger.

Deputy Cranford testified the handgun failed to discharge when Defendant pulled the trigger. Deputy Cranford's testimony that Defendant committed the independent criminal act in the presence of the officer breaks the causal chain between the presumably unconstitutional stop and the discovery of the evidence.

The facts of this case are directly on point with the United States Court of Appeals for the Fourth Circuit's decision in *State v. Sprinkle*, 106 F.3d 613 (4th Cir. 1997). In *Sprinkle*, the officers conducted an investigatory stop of the defendant without reasonable suspicion of criminal activity. *Id.* at 618-19. While an officer was performing a pat-down of the defendant, the defendant began to run with the officer in pursuit. *Id.* at 616. The defendant pulled a handgun from the front of his pants and continued to run with his gun still drawn and fired one shot toward the officer. *Id.*

The Court explained: "If a suspect's response to an illegal stop 'is itself a new, distinct crime, then the police constitutionally may arrest the [suspect] for that crime.' " *Id.* at 619 (quoting *United States v. Bailey*, 691 F.2d 1009, 1017 (11th Cir. 1982)). "Because the arrest for the new, distinct crime is lawful, evidence seized in a search incident to that lawful arrest is admissible." *Id.* (citing *Bailey* at 1018).

Our federal courts have explained the reasons for holding that a new and distinct crime, following an arguably illegal stop or search of the defendant, is a sufficient intervening event to provide an independent basis for an arrest and/or the admissibility of evidence uncovered during a search incident to that arrest.

> (1) "a contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct[,]" *Bailey*, 691 F.2d at 1017-18; (2) the exclusionary rule does not extend so far as to require suppression when the discovery of the evidence can be traced to the separate offense, *see*, *e.g.*, *Waupekenay*, 973 F.2d at 1538; and (3)

> to hold otherwise would encourage persons to resist the police and create potentially violent and dangerous confrontations. *Id.* Challenges to even unconstitutional police searches must be made in the courts, not on the street.

*United States v. Crump*, 62 F. Supp. 2d 560, 568 (D. Conn. 1999).

Like in *Sprinkle*, when Defendant "drew and fired his gun at [Deputy Cranford], he committed a new crime that was distinct from any crime he might have been suspected of at the time of the initial stop." *Sprinkle*, 106 F.3d at 619. Deputy Cranford had probable cause to arrest Defendant "because the new crime purged the taint of the prior illegal stop[,] [a]nd the gun, which was in plain view at the scene of the new crime, could be legitimately seized." *Id.* at 619-20.

Although Defendant's commission of a separate and distinct criminal offense is alone sufficient as an "intervening circumstance" to purge the taint of the presumed illegal stop, we note the third factor set forth in *Strieff* also favors attenuation. "The exclusionary rule exists to deter police misconduct. The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Strieff*, __ U.S. at __, 195 L. Ed. 2d at 409.

Here, Deputy Cranford explained that he and other officers knew Rockhill Road to be a high crime area; while patrolling the area he turned onto Rockhill Road and saw a vehicle parked partially onto the roadway; the vehicle drove away as Deputy Cranford approached; Defendant "walk[ed] away from the vehicle;" Deputy Cranford believed the car drove off and Defendant started to walk away in reaction to his presence; and he decided to investigate "to make sure everything was okay" due to the "area we were in."

Like in *Strieff*, there was no indication that the stop of Defendant "was part of any systemic or recurrent police misconduct." *Id.* at __, 195 L. Ed. 2d 410. Even if the initial stop was unjustified and unsupported by reasonable suspicion, it does not "rise to a purposeful or flagrant violation of [Defendant's] Fourth Amendment rights." *Id.* at __, 195 L. Ed. 2d at 410. The trial court's ultimate conclusion to allow admission of the recovered, stolen, and loaded weapon was proper, and more so under plain error review, where Defendant failed to object to the admission of, or testimony concerning, the handgun. Defendant has failed to carry his burden to exclude this evidence under plain error review or the reverse the jury's conviction.

V. Conclusion

The evidence of the stolen handgun was admissible because the presumably unlawful stop was sufficiently attenuated by Defendant's intervening commission of a separate and distinct criminal offense of concealing and pointing a stolen and loaded gun at Deputy Cranford and pulling the trigger. These events "broke the causal chain between the [presumed] unconstitutional stop and the discovery of evidence." *Id.*

This issue is properly before us on plain error review of the trial court's "ultimate ruling" and conclusion to deny Defendant's motion to suppress. *See Bone*, 354 N.C. at 8, 550 S.E.2d at 486 (stating this Court determines "admissibility and whether the *ultimate ruling* was supported by the evidence" (emphasis supplied)). Furthermore, as was true in *Strieff*, "there is no evidence that [the] stop reflected flagrantly unlawful police misconduct." *Id.*

The trial court properly denied Defendant's motion to suppress. Defendant has failed in his burden to show error, much less plain error, in the trial court's ultimate ruling to allow the testimony concerning and the weapon itself to be admitted. *It is so ordered.*

NO PLAIN ERROR.

Judge DILLON concurs with separate opinion.

Chief Judge McGEE dissents with separate opinion.

DILLON, Judge, concurring.

I concur but write separately to address the dissent's issue with the State's failure to preserve its appellate argument.

Defendant was convicted of possessing a firearm which was discovered during a stop. At the suppression hearing below, the State's *sole* argument was that the stop itself was lawful, and, therefore, the firearm was admissible.

During the suppression hearing, the State also offered evidence, which the trial court found credible, that during the stop Defendant pulled the concealed firearm, pointed it at the officer and pulled the trigger. I agree with the majority that this intervening event makes the gun admissible. Though the State failed to make this "winning" argument at the suppression hearing, the trial court denied Defendant's motion.

The dissent is based, in large part, on a view that the State, as the appell*ee*, should be prohibited just like Defendant, as the appell*ant*, from making any legal argument on appeal that it failed to make at the suppression hearing. Indeed, it is axiomatic that an appell*ant* cannot "swap horses" by making a new argument on appeal that was not made before the trial court in order to get a "better mount." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

Rule 10 of our appellate rules allows an appellee to propose "alternative bas[e]s in law for supporting the judgment" in addition to the basis relied upon by the trial court. However, Rule 10 states that such alternative bases that the appellee desires to raise on appeal must have been "properly preserved[.]" N.C. R. App. P. 10(c).

So based on Rule 10 one could argue that the State, as the appellee, should be limited, just like Defendant-appellant, to the arguments it made at the suppression hearing. Had the State lost, the State (as the appell*ant*) would be allowed on appeal to make *only* the losing argument that it made before the trial court. And, therefore, the State should not be allowed to make the winning argument in this case simply because it won at the trial court based on a losing argument. That is, the State did not "properly preserve" (as required by Rule 10) the winning argument. *See Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989) ("Because a contention not made in the court below may not be raised for the first time on appeal, the . . . contention [by the party seeking to raise that issue on appeal] was not *properly* presented to the Court of Appeals for review[.]")

However, one could argue that an appellate court may consider *any* basis which supports the trial court's correct result, even if the basis was not relied upon by the trial court or argued by the parties. This view is based on Supreme Court's jurisprudence suggesting that our role as an appellate court is simply to determine whether the trial court *got it right* based on its findings, even if the reasoning may be faulty. *See*, *e.g.*, *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d at 482, 486 (2001) ("The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence.") And here, the State *did present* evidence, which the trial court *did find* credible, to support the winning argument, namely the trial court found that Defendant attempted to shoot the officer. Based on this argument, we should simply affirm the order of the trial court.

But presuming that Rule 10 does prevent the State from arguing (and our Court from considering) the "winning" argument, I concur with

the majority's invocation of Rule 2 to consider the winning argument. I believe that this matter involves "exceptional circumstance [and] significant issues of importance in the public interest" and in my discretion, I conclude that the invocation of Rule 2 is necessary "to prevent injustice." *State v. Campbell*, 2017 N.C. LEXIS 400, *6-7 (June 9, 2017). It is a matter of public interest that private citizens illegally carrying concealed weapons not be excused from assaulting an officer simply because the officer may have erred in determining that reasonable suspicion existed to justify a stop, where the officer was not otherwise assaultive in his behavior. I note that Defendant is not prejudiced by the State's failure to make the winning argument at the suppression hearing. Indeed, the State put on evidence at the suppression hearing that Defendant assaulted the officer during the stop, and Defendant had the opportunity to rebut the State's evidence regarding Defendant's assaultive behavior. And there is no winning argument which Defendant's counsel could have made to justify the exclusion of the firearm where it was found that Defendant used it to assault the officer.

Therefore, I concur.

McGEE, Chief Judge, dissenting.

Defendant asks this Court to reverse the trial court's denial of his motion to suppress. Defendant argues Deputy Cranford did not have reasonable suspicion to stop him when the deputy observed him walking on the side of the road in Wilmington, North Carolina. Rather than address the sole issue presented by Defendant in this appeal, the majority and the concurrence choose to reach, and ultimately credit, a novel legal theory of admissibility advanced by the State that was never raised or considered in the trial court.

If the State's argument had been preserved, I would agree with the majority – with some reservations, outlined below – that Deputy Cranford's stop of Defendant was sufficiently attenuated from the discovery of the firearm under the Supreme Court of the United States' holding in *Utah v. Strieff*, ___ U.S. ___, 195 L. Ed. 2d 400 (2016). However, the State failed to preserve its attenuation argument, and I respectfully dissent from the majority's decision to reach and credit that argument.

The rule the majority crafts is inconsistent with normal rules of preservation. This Court regularly refuses to consider arguments presented by a criminal defendant for the first time on appeal, reasoning that the argument has been waived by the defendant's failure to first make the argument to the trial court. There is no reason why this rule should

operate differently for the State and, consistent with binding precedent, I would hold the State's failure to raise its attenuation argument in the trial court warrants dismissal of that argument here. Deputy Cranford's stop of Defendant was unconstitutional, and I would therefore reverse the trial court's denial of Defendant's motion to suppress and vacate his conviction.

## I. Reasonable Suspicion to Stop Defendant

I first address whether there was a sufficient basis for Deputy Cranford to stop Defendant. The majority does not consider whether Deputy Cranford's conduct was unconstitutional, and instead proceeded directly to a discussion of whether the unconstitutional stop, if it existed, was attenuated from the discovery of the evidence the Defendant moved to suppress. However, consideration of the constitutionality of the stop is useful, since a determination that the stop was lawful would conclude our inquiry in this case. Also, even if the stop was unlawful, being able to identify precisely what conduct of Deputy Cranford was unjustified is valuable in the *Strieff* attenuation analysis.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. *See* U.S. Const. Amend. IV. The United States Supreme Court has held that "[a]n investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion." *Ornelas v. United States*, 517 U.S. 690, 693, 134 L. Ed. 2d 911, 917 (1996) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)). Reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped" has violated the law. *Navarette v. California*, 572 U.S. ___, ___, 188 L. Ed. 2d 680, 686 (2014).

As this Court has held,

> the legal evaluation of a police officer's reasonable suspicion determination must be grounded in a pragmatic approach. Reasonable suspicion is a nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Our nation's highest court has acknowledged that the concept of reasonable suspicion is somewhat abstract and has deliberately avoided reducing it to a neat set of legal rules. As such, common sense and ordinary human experience must govern over rigid criteria.

*State v. Mangum*, ___ N.C. App. ___, ___, 795 S.E.2d 106, 118 (2016) (citations, quotation marks, and brackets omitted). In order to meet the

reasonable suspicion threshold, "[t]he officer, of course, must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *State v. Knudsen*, 229 N.C. App. 271, 284, 747 S.E.2d 641, 650 (2013) (quotation omitted). "An officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012). As a reviewing court, we "must consider the totality of the circumstances — the whole picture." *Id.*

In the present case, Deputy Cranford observed Defendant standing on the side of the road in an area known for high crime. Defendant was talking to an unknown person in a vehicle. Deputy Cranford testified that the vehicle was parked "partially in the road" with its brake lights engaged. Shortly after Deputy Cranford arrived in his police cruiser and stopped about twenty-five to fifty yards from the vehicle, the vehicle drove away at a normal speed and in a normal fashion. Deputy Cranford believed the driver of the vehicle "recognized [him] as a deputy" and drove off in an effort to avoid him. Deputy Cranford did not check the license plate of the vehicle, did not follow the vehicle, and did not know if the driver or any occupants of the vehicle were involved in any criminal activity. After the vehicle left, Defendant walked down the road with a cellphone in his hands.

Deputy Cranford testified he did not know if Defendant had exited the vehicle, that nothing about Defendant's appearance drew his attention, and that he did not know who Defendant was or what Defendant was doing. Deputy Cranford deemed the vehicle driving away as "suspicious" and testified it was his belief that Defendant's walking away "was in reaction to [Deputy Cranford's] presence as well[.]" On cross-examination, Deputy Cranford admitted that "no matter what [Defendant] did walking away from [the vehicle], [he] thought that was suspicious." Accordingly, Deputy Cranford drove past Defendant, turned around, and activated his blue lights to effectuate a stop. Deputy Cranford characterized Defendant as being "polite and cooperative" when he was first stopped. At the suppression hearing, the following exchange occurred between Deputy Cranford and the prosecutor:

> [Prosecutor:] So what were your particularized concerns? Why did you stop to talk to [Defendant]?
>
> [Deputy Cranford:] Due to the area that we were in and the reason when I got close the car pulled off. I saw

> [Defendant] walking away. I didn't know if he had gotten out of the [vehicle], if a – if he was lost, if a drug deal had just happened, or what was going on. So I wanted to get out and investigate and make sure everything was okay.

As the concurrence and I recognize, the totality of the circumstances of this case does not rise to the minimal level of objective justification required for a reasonable articulable suspicion under the Fourth Amendment. Deputy Cranford observed Defendant talking to someone in a vehicle that was haphazardly parked on the side of the road in a high crime area. According to Deputy Cranford's own testimony, he did not recognize Defendant, did not know if Defendant had been in the "suspicious" vehicle, and nothing about Defendant's actions or appearance drew Deputy Cranford's attention. The vehicle drove away at a normal speed and in a normal fashion, and Defendant merely walked down the road. Nevertheless, Deputy Cranford thought it "suspicious" that Defendant had spoken to someone in a vehicle. Rather than following the vehicle, Deputy Cranford chose to activate his blue lights and effectuate a stop of Defendant.

Deputy Cranford had, at most, an inchoate and unparticularized hunch that criminal activity was afoot. Therefore, Defendant's actions did not give rise to the minimal level of objective justification required by the Fourth Amendment. *See*, *e.g.*, *Knudsen*, 229 N.C. App. at 285, 747 S.E.2d at 651.

## II. Merits of the Majority's Attenuation Analysis

As the majority correctly notes, evidence discovered as a result of an illegal search or seizure is generally excluded at trial. *See Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963). Despite this general principle, there are several exceptions to the exclusionary rule, including the one at issue here: the attenuation doctrine. *See generally Utah v. Strieff*, ___ U.S. ___, ___, 195 L. Ed. 2d 400, 407 (2016). Whether an intervening event is sufficient to "break the causal chain between the unlawful stop and the discovery of" the evidence and is therefore "attenuated[,]" rests on three factors as noted by the majority: (1) "the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search;" (2) "the presence of intervening circumstances;" and (3) "the purpose and flagrancy of the official misconduct." *Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 408. Had the State preserved its attenuation argument notwithstanding its failure to raise it at trial, which I will discuss later, I would generally agree with

the majority that the facts of this case favor attenuation. However, I have the following reservations with the majority's application of *Strieff*'s three factors.

(A) Temporal Proximity Between the Stop and the Discovery of Evidence

The first step of *Strieff* analyzes the "temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search." *Id.* The majority does not analyze this factor at all, but rather proceeds directly to the second factor in the analysis. I believe that an analysis of whether an illegal stop is sufficiently attenuated from the discovery of some evidence is properly conducted by considering all three factors the Supreme Court of the United States identified as bearing on whether attenuation is present.

The discovery of the firearm in the present case occurred in extremely close proximity in time to the unconstitutional stop. After being seized, Deputy Cranford spoke for some time with Defendant, contacted dispatch, searched for outstanding warrants, and then again spoke with Defendant. All of these actions were part of the unconstitutional stop, and were undertaken while the stop was ongoing. Therefore, the discovery of the firearm, which occurred when Defendant pulled the firearm from his waistband and attempted to discharge it, occurred seconds after the unconstitutional stop. I would find that this factor favors attenuation.

(B) Intervening Circumstances

The second factor to consider in an attenuation analysis is whether there were sufficient intervening circumstances between the unconstitutional conduct and the discovery of the evidence. *Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 408. Like the majority, I believe that Deputy Cranford's observation of a new criminal act perpetrated by Defendant during the course of the stop serves as an intervening circumstance that strongly favors attenuation. At the suppression hearing, as the majority notes, Deputy Cranford testified that during the stop he asked Defendant to lift up his shirt and Defendant responded by raising his shirt, pulling a firearm from his waistband, pointing the gun at Deputy Cranford, and pulling the trigger. According to Deputy Cranford's testimony, the gun did not go off when the trigger was pulled.[1]

1. The jury apparently did not credit Deputy Cranford's testimony on this point, finding Defendant not guilty of attempted first-degree murder. However, in reviewing a trial

Deputy Cranford's testimony that Defendant had committed the criminal act of attempted first-degree murder breaks the causal chain between the unconstitutional stop and the discovery of the evidence, and is entirely unconnected from the stop. However, I would not go so far as to say, as the majority does, that the "commission of a separate and distinct criminal offense is *alone* sufficient . . . to purge the taint of the . . . illegal stop[.]" (emphasis added). In the present case, it is sufficient to hold that the intervening criminal act perpetrated by Defendant strongly favors attenuation and, along with the third factor (discussed below), would attenuate Deputy Cranford's unconstitutional stop from the discovery of the firearm. I would leave a broader holding — that the commission of a separate and distinct criminal offense will *always* be decisive — to an appropriate future case.

(C) The Purpose and Flagrancy of the Official Misconduct

The final *Strieff* factor inquires into the purpose and flagrancy of the police misconduct. As the majority recognizes, "[t]he exclusionary rule exists to deter police conduct. The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence – that is, when it is purposeful or flagrant." *Strieff*, ___ U.S. at ___, 95 L. Ed. 2d at 409 Like the majority, I would find that the third factor favors attenuation.

As the Supreme Court of the United States has held, there must be something more than a lack of reasonable suspicion in order for a finding of flagrancy to be appropriate. *See Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 410 ("For [a] violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure."). While Deputy Cranford's conduct in stopping Defendant was without reasonable suspicion, his errors and unconstitutional conduct do not rise to a "purposeful or flagrant violation of [Defendant's] Fourth Amendment rights," nor is there any indication on this record that the stop "was part of any systemic or recurrent police misconduct." *Id.*

III. Preservation of Attenuation Argument

Had the State raised and argued to the trial court its theory that Deputy Cranford's stop of Defendant was sufficiently attenuated from the discovery of the firearm, my disagreement with the majority would end here. However, the State failed to argue its attenuation argument in the trial court, and this Court should not address it in the first instance.

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court's ruling on a motion to suppress, we examine the evidence in the light most favorable to the State. *See State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010).

At trial, Defendant moved to suppress the evidence found in the search, arguing that Deputy Cranford's stop violated his rights under the Fourth Amendment to the United States Constitution. At the hearing on Defendant's motion, the State presented evidence from Deputy Cranford and his superior officer. Thereafter, the State defended the constitutionality of the stop solely on the grounds that Deputy Cranford possessed reasonable suspicion to stop Defendant. The trial court ruled exclusively on that basis, and found that Deputy Cranford possessed reasonable suspicion to stop Defendant. The attenuation doctrine was never raised by the State and, as the majority concedes, the words "attenuation" and "intervening circumstance" were never spoken at the suppression hearing.

As the majority notes, the question for this Court when reviewing a trial court's ruling on a motion to suppress "is whether the ruling of the trial court was correct and not whether the reason given therefor [was] sound or tenable. The crucial inquiry for this Court is admissibility *and whether the ultimate ruling was supported by the evidence*." *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (emphasis added). The majority reads the second clause, italicized above, from Bone's holding. When considering the admissibility of the evidence, we must consider whether the "ultimate ruling" of the trial court was supported by the evidence. The "ultimate ruling" of the trial court in the present case was that the motion to suppress should be denied because Deputy Cranford had reasonable suspicion to stop Defendant. As discussed above, this ruling was incorrect.

We should not suggest that the trial court's "ultimate ruling" denying Defendant's motion to suppress – because Deputy Cranford had reasonable suspicion to stop Defendant – also contained an unwritten, but implied, alternative ruling that, if Deputy Cranford's stop was unconstitutional, the unconstitutional stop was sufficiently attenuated from the discovery of the evidence so as to be admissible. The trial court never ruled on whether the unconstitutional stop was sufficiently attenuated from the discovery of the evidence, because attenuation was never raised by the State.

The majority suggests that the "occurrence of an intervening event" only "becomes an issue" if the trial court "finds the underlying illegality," and that an "intervening event" is not an "arguable issue" until the defendant "sustain[s] his burden of persuasion on the illegality of the police conduct." I disagree. The legality of Deputy Cranford's stop of Defendant and the admissibility of the firearm found on Defendant *was* at issue. In fact, it was the *only* issue being litigated in Defendant's motion to

suppress. The State argued, uninterrupted and at length, in opposition to Defendant's motion to suppress. Nothing limited the State from arguing an alternative position, such as attenuation, the position it now raises in this Court in the first instance. Litigants make alternative arguments in support of legal positions in our trial courts on a daily basis, and waive the arguments they fail to make. If the majority were correct, the State would only raise its "intervening event" theory[2] after the trial court had determined that the stop was not supported by reasonable suspicion. But at that point, it would have been too late – the trial court would have already ruled on and granted Defendant's motion to suppress.

The State had ample opportunity and compelling reason to raise its attenuation argument as an alternative to its argument that the stop was supported by a reasonable suspicion. Although *Strieff* had not yet been decided by the Supreme Court of the United States, *Strieff* did not change governing law; it only supplemented existing law by applying the factors set out in *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416 (1975). The attenuation doctrine is firmly rooted in North Carolina law, and has been considered and applied in North Carolina Supreme Court cases decades old. *See, e.g.*, *State v. Allen*, 332 N.C. 123, 127-28, 418 S.E.2d 225, 228-29 (1992); *State v. Freeman*, 307 N.C. 357, 359-60, 298 S.E.2d 331, 332-33 (1983). If the State had wished to argue an alternative position, it was required to do so in the trial court in the first instance. The State clearly knows how to make such an alternative argument, as they did so in their brief to this Court in this case.

This Court confronted a similar situation in *State v. Gentile*, 237 N.C. App. 304, 766 S.E.2d 349 (2014). In *Gentile*, the trial court granted the defendant's motion to suppress evidence found in a search of his home, holding that when the officers noticed the smell of marijuana emanating from the residence, they "were not in a place in which they had a right to be." *Gentile*, 237 N.C. App. at 308, 766 S.E.2d at 352. On appeal, this Court agreed with the trial court that the officers were in a place they had "no legal right to be" when they smelled the marijuana, which was the basis for the search. *Id.* at 310, 766 S.E.2d at 353. After so holding, the trial court turned to the State's belated argument that

> even if the detectives' entry onto constitutionally protected areas of defendant's property was unlawful, the trial court

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2. I note that an "intervening event," or intervening circumstance, is only one of the three factors used to determine if the discovery of some evidence is sufficiently attenuated from unconstitutional conduct. *See Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 408. For ease of reading, I employ the nomenclature employed by the majority.

> erred by granting the motion to suppress because it failed to examine the remaining portions of the search warrant affidavit to determine if the warrant was still supported by probable cause, absent the odor of marijuana.

*Id.* Confronted with this argument, this Court held that the State had "failed to preserve this issue on appeal" because "the State never argued before the trial court that the motion to suppress should be denied because even if the detectives had no legal right to be on the driveway when they smelled the marijuana, the remaining portions of the search warrant were nevertheless sufficient to establish probable cause." *Id.* at 310, 766 S.E.2d at 353-54. Accordingly, this Court dismissed the State's alternative argument as unpreserved. *Id.*

The circumstances of the present case are no different from the ones confronted by this Court in *Gentile*. In the present case, as in *Gentile*, the State failed to argue to the trial court its alternative theory as to why Defendant's motion to suppress should be denied. Since "the State never argued before the trial court that the motion to suppress should be denied because" the discovery of the evidence was sufficiently attenuated from Deputy Cranford's unconstitutional conduct, the State "failed to preserve this issue on appeal." *Id.* at 310, 766 S.E.2d at 353. This Court is bound by *Gentile*'s reasoning. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

The majority suggests that *Gentile* is "easily distinguishable" from the present case because in *Gentile* "the State sought to overturn the trial court's ruling, which granted the defendant's motion to suppress," while in this case the State seeks to defend the trial court's denial of Defendant's motion to suppress. Respectfully, I disagree with the majority's attempt to distinguish *Gentile*, and note it creates a needlessly complicated and unfair rule of preservation. Under the majority's theory, in *Gentile*, all the State would have had to do to be able to "swap horses" would have been to convince the trial court that their incorrect theory – the police were in a place in which they had a lawful right to be when they smelled the marijuana – was in fact correct. In that circumstance, the State would have been free to "swap" that theory for any other theory on appeal – including the one we refused to consider because it was not properly preserved – while the defendant would have been relegated to those theories it preserved by arguing them to the trial court. In other words, whether a litigant is bound by the arguments it makes in the trial court depends only upon whether the arguments were accepted by the trial court, regardless of whether the trial court was correct. If the State loses a motion to suppress – i.e. a defendant's motion to suppress is

granted – then the State is forever wedded to whatever theory it presented at trial. If, however, the defendant's motion to suppress is denied – on an incorrect or otherwise untenable theory – the State may thereafter argue any legal theory it wishes in order to preserve its favorable ruling. This is, in my view, an untenable theory of preservation.

This Court has held, time and again, that when a "defendant presents a *different theory* [on appeal] to support his motion to dismiss than that he presented at trial, this assignment of error is waived." *State v. Euceda-Valle*, 182 N.C. App. 268, 272, 641 S.E.2d 858, 862 (2007) (emphasis added) (citation omitted); *see also State v. Chapman*, ___ N.C. App. ___, 781 S.E.2d 320, 330 (2016) ("Because [the defendant] *has failed to properly preserve the specific argument* she now seeks to make on appeal regarding the basis upon which her motion to dismiss should have been granted, we decline to reach the merits of her argument." (emphasis added) (citations omitted)). It appears arbitrary to declare some arguments preserved and others unpreserved, not by whether those arguments were raised at trial, but rather simply by virtue of who obtained a favorable ruling by the trial court, regardless of whether that ruling was correct.

Ironically, in the present case the majority would agree that the State could not raise its attenuation argument in this Court, if only the trial court had gotten the law *right*. If the trial court had correctly determined Officer Cranford's stop of Defendant violated the Fourth Amendment, Defendant would be able to defend that ruling under any theory he wished on appeal, while the State would be confined to that theory raised in the trial court. Since the State inexplicably did not raise the attenuation doctrine in the trial court, it would be barred from doing so in this Court in the first instance.

The North Carolina Rules of Appellate Procedure were designed to further "fundamental fairness and the predictable operation of the courts[.]" *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007). On appeal to this Court, Defendant focused the arguments in his principal brief exclusively on whether Deputy Cranford had reasonable suspicion to seize him under the Fourth Amendment. Defendant did so for good reason: the State's argument urging the trial court to deny his motion to suppress, and the trial court's ultimate ruling on that motion to suppress, were exclusively focused on whether reasonable suspicion existed for the stop. After Defendant filed his brief in this Court, though, the ground shifted beneath his feet; the State filed a brief waiving any argument that the stop was supported by reasonable suspicion and moved forward exclusively on the theory that the presence or absence of reasonable

suspicion did not matter because the stop was attenuated from the discovery of the evidence.

Upon receiving the State's brief, Defendant was forced to litigate that new issue, never before considered or passed upon within the context of the present case, in a reply brief. To avoid being blindsided, should a defendant now make arguments on appeal, and then proceed to preemptively research and brief any alternative bases the State may conceivably argue to defend the trial court's ruling? Perhaps not, lest a defendant give the State any ideas about new theories of admissibility. Preservation and the appellate rules are designed to prevent this circumstance.

Our Supreme Court has held that "the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934); *see also State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." (citation omitted)). The majority suggests this rule only applies "to instances where the party. . . carrying the burden on appeal to show error in the lower court's ruling on appeal, and relies upon a theory not presented before the lower court." But the Supreme Court in *Weil* did not equivocate: it held that a *party* – not just an appellant, but a *party* – may not "swap horses" between courts to gain a better mount on appeal. *Weil*, 207 N.C. at 10, 175 S.E. at 838. Applying this rule to both appellants and appellees is sensible, as it ensures fairness and requires litigants to present legal arguments they believe to be meritorious to the trial court before presenting them to an appellate court.

In faithfully following our Supreme Court's precedent, along with that precedent's necessary implications, our Supreme Court's holdings in *Wiel* and *Sharpe* decide this case in Defendant's favor. It is undisputed that the State never argued its attenuation theory in the trial court. The State proceeded only on the theory that Deputy Cranford's stop of Defendant was permissible because reasonable suspicion was present, and in denying Defendant's motion to suppress the trial court only ruled on that basis. This precludes the State from raising its attenuation argument on appeal in the first instance.

This Court regularly dismisses arguments first advanced by defendants on appeal in criminal cases, reasoning that those arguments have been waived due to the defendants' failure to raise them in the trial

court. *See, e.g.*, *State v. Mastor*, ___ N.C. App. ___, ___, 777 S.E.2d 516, 521 (2015) (dismissing a defendant's argument where the defendant did not "raise or argue" the objection in the trial court, reasoning that the defendant "failed to preserve [the] issue for appellate review"). That rule should operate no differently for the State.[3] Attenuation is a theory of admissibility wholly independent from whether reasonable suspicion existed for a stop. I would hold that if the State wishes to argue alternative legal theories of admissibility, the onus is on the State to make those arguments to the trial court. Because Deputy Cranford's stop of Defendant was unconstitutional and the State failed to preserve its attenuation argument, I would reverse the trial court's denial of Defendant's motion to suppress and vacate his conviction. I dissent from the majority's decision to reach the State's belated attenuation argument.

Invocation of N.C.R. App. P. Rule 2

I also dissent from the majority's decision to "rule to invoke Rule 2 [of the North Carolina Rules of Appellate Procedure] in this case[.]" The majority concludes that, even if the State's argument regarding attenuation was not preserved, this case is a proper one for this Court to dispense with the rules of appellate procedure by invoking N.C.R. App. P. 2. I disagree. As our Supreme Court has repeatedly stated: "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (citation omitted). "This assessment – whether a particular case is one of the rare 'instances' appropriate for Rule 2 review – must necessarily be made in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected." *State v. Campbell*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, 2017 N.C. LEXIS 400, at *7 (2017) (citations omitted).

The present case does not implicate "significant issues of importance in the public interest." Defendant in this case was convicted of a single offense, possession of a stolen firearm, which is punishable as a class H felony. *See* N.C. Gen. Stat. § 14-71.1 (2015). I do not see the merit in the majority's apparent assertion that *any* shooting or attempted shooting

3. Though not dispositive, the United States Court of Appeals for the Tenth Circuit has similarly held that attenuation arguments not raised in the trial court are waived on appeal. *See United States v. Hernandez*, 847 F.3d 1257, 1261-62 (10th Cir. 2017) (holding the government waived its attenuation argument by not making that argument to the district court).

of a police officer – the only fact the majority propounds as a reason for invoking Rule 2 – is a *de facto* reason to dispense with the rules of appellate procedure. Such a rule would absolve the State of its need to follow normal preservation rules in any case that allegedly involved the shooting (or, as here, an alleged attempted shooting) of an officer, and would come close to the creation of an "automatic right to review via Rule 2" for police shooting cases, a type of rule our Supreme Court very recently rejected. *See Campbell*, ___ N.C. at ___, ___ S.E.2d at ___, 2017 N.C. LEXIS 400, at *7 ("In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis."). The present case, in my view, also fails to implicate any manifest injustice. Rather, the State would only be forced to proceed on appeal on those legal theories that it raised in the trial court.

## IV. Conclusion

Due to a lack of reasonable suspicion, Deputy Cranford's stop of Defendant violated Defendant's right to be free from unreasonable searches and seizures under the Fourth Amendment. The State does not contest this fact, and on appeal only defends the stop by arguing that the discovery of the evidence was sufficiently attenuated from Deputy Cranford's unconstitutional conduct. Had attenuation been raised and preserved by the State in the trial court, I agree with the majority that the discovery of the firearm would have been sufficiently attenuated from Deputy Cranford's unconstitutional stop of Defendant.

But the State failed to raise its attenuation argument before the trial court, and cannot raise it here for the first time. I dissent from the majority's and the concurrence's decision to address the State's belated attenuation argument. The preservation rule the majority crafts is untenable, and by faithfully applying precedent from this Court and our Supreme Court, I would dismiss the State's belated argument, reverse the trial court's denial of Defendant's motion to suppress, and vacate Defendant's conviction. I further dissent from the majority's and the concurrence's alternative decision to invoke N.C.R. App. P. 2.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER MICHAEL JOHNSON

No. COA16-734

Filed 18 July 2017

**Probation and Parole—probation revocation—lack of jurisdiction—lack of notice of probation violations—Justice Reinvestment Act—absconding**

The Court of Appeals granted defendant's writ of certiorari and concluded that the trial court lacked jurisdiction to revoke defendant's probation where defendant did not waive his right to notice of his alleged probation violations, and the State failed to allege a revocation-eligible violation. Defendant committed the offense of taking indecent liberties with a child prior to the Justice Reinvestment Act's effective date, and therefore, the absconding condition did not apply to defendant.

Appeal by defendant, by writ of certiorari, from judgment entered 14 March 2016 by Judge Milton Fitch in Currituck County Superior Court. Heard in the Court of Appeals 25 January 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General W. Thomas Royer, for the State.*

*Peter Wood, for defendant-appellant.*

CALABRIA, Judge.

Christopher Michael Johnson ("defendant") appeals, by writ of certiorari, from a judgment revoking his probation and activating his suspended sentence. After careful review, we conclude that the trial court lacked jurisdiction to revoke defendant's probation based on the violations alleged. Accordingly, we vacate the trial court's judgment and remand for further proceedings.

## I. Background

On 16 August 2013, defendant entered an *Alford* plea to two counts of taking indecent liberties with a child. *See generally North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). These offenses occurred on or about 4 October 2011. According to the plea arrangement, defendant

was to "receive an active sentence on one charge, and a probationary type sentence on the second count."[1] For the second count, the trial court sentenced defendant to 16 to 20 months in the custody of the North Carolina Division of Adult Correction but suspended his sentence and placed him on 36 months of supervised probation.

On 5 February 2016, defendant's probation officer ("Officer Gibbs") filed a report alleging that defendant had willfully violated the following conditions of his probation:

> 1. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . . " in that
>
> OFFENDER WAS ARRESTED IN VIRGINIA AND FAILED TO REPORT TO THIS OFFICE WITHIN 72 HOURS AFTER ARREST. RELEASE DATE ACCORDING TO JAIL WAS 1/21/16
>
> 2. Condition of Probation "The defendant shall pay to the Clerk of Superior Court the 'Total Amount Due' as directed by the Court or probation officer" in that
>
> OFFENDER WAS ORDERED TO PAY COURT INDEBTEDNESS BY JUDGE IN SUPERIOR COURT AND AT THIS TIME HE HAS PAID $70.48 AND IS IN ARREARS $454.52
>
> 3. Condition of Probation "The defendant shall pay to the Clerk of Superior Court the monthly supervision fee as set by law" in that
>
> OFFENDER WAS ORDERED TO PAY SUPERVISION FEES AND AS OF THIS DATE HE HAS PAID [$]104.52 AND IS IN ARREARS [$]815.48. WAS SUPPOSED TO PAY $40 A MONTH
>
> 4. Condition of Probation "Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer" in that
>
> OFFENDER WAS TOLD NOT TO LEAVE THE STATE OF NORTH CAROLINA BY THIS OFFICER UNLESS HE HAD PERMISSION AND ON 1/16/16 AN OFFICER FROM VA BEACH POLICE DEPARTMENT INFORMED ME THAT

1. The instant appeal only pertains to file number 12 CRS 646. Neither the appellate record nor the parties' briefs contain further information about the active sentence that defendant purportedly received in file number 12 CRS 645.

> HE WAS FOUND ASLEEP IN VIRGINIA AND ARRESTED FOR TRESPASSING. ALSO ON 8/8/15 HE WAS CAOUGHT [sic] STAYING AT A PLACE CALLED DERBY RUN IN VIRGINIA. BOTH NOT IN THE STATE OF NC AND BOTH TIMES WITHOUT PERMISSION.
>
> 5. Other Violation
>
> OFFENDER WAS TOLD THAT HE HAD TO GO BACK TO SEX OFFENDER TREATMENT STARTING ON 1/13/16 BUT HE FAILED TO REPORT FOR THAT TREATMENT.

On 16 February 2016, Officer Gibbs filed an addendum alleging the following additional willful violations of defendant's probation:

> 1. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . . " in that
>
> OFFENDER MISSED HIS SCHEDULED OFFICE VISIT WITH HIS OFFICER ON 2/4/16 AND THIS IS A REGULAR CONDITION OF PROBATION. HE DID NOT CALL TO LET ME KNOW HE WOULD NOT BE HERE.
>
> 2. Condition of Probation "Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer" in that
>
> ON OR ABOUT 1/21/16 OFFENDER WAS RELEASED FROM CUSTODY IN VA BEACH ACCORDING TO THEIR RECORDS AND HE HAS FAILED TO MAKE HIS WHEREABOUTS KNOWN TO THIS OFFICE. I CALLED HIS NUMBER AND CHECKED HIS RESIDENCE ON 2/5/16 & 2/11/16. I WAS TOLD HE HAS NOT BEEN THERE IN A WHILE. HE IS NOT IN THE LOCAL HOSPITAL OR JAIL AND HE MISSED HIS LAST APPT WITH ME. I AM NOW DECLARING HIM AN ABSCONDER.

According to the violation reports filed by Officer Gibbs, defendant had not previously served any periods of confinement in response to violations ("CRV") pursuant to N.C. Gen. Stat. § 15A-1344(d2) (2015).

A probation violation hearing was held in Currituck County Superior Court on 14 March 2016. Defendant admitted the violations, "but not the willfulness," and explained to the court that he was "not intending to abscond." Defendant requested that he be allowed to remain on probation so that he could continue to work and proceed with sex

offender treatment. Officer Gibbs testified that he deemed defendant to be an absconder after "30 days without any contact" following defendant's arrest in Virginia. At the conclusion of the hearing, the trial court found defendant "in willful violation of his probation, revoke[d] him, and invoke[d] his active sentence." The court incorporated both of the violation reports filed by Officer Gibbs into its written judgment. The court also found, in pertinent part: that defendant had violated each of the conditions alleged "willfully and without valid excuse"; that "[e]ach violation is, in and of itself, a sufficient basis upon which th[e] Court should revoke probation and activate the suspended sentence"; and that "[t]he Court may revoke defendant's probation . . . for the willful violation of the condition(s) that he . . . not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a) . . . ."

Three days later, on 17 March 2016, defendant reappeared before the trial court requesting reconsideration of its decision to revoke his probation. The court denied his motion. Defendant entered oral notice of appeal.

## II. Petition for Writ of Certiorari

On 29 August 2016, defendant petitioned this Court to issue its writ of certiorari ("PWC") to review the trial court's judgment revoking his probation and activating his suspended sentence. *See generally* N.C.R. App. P. 21(a)(1). He acknowledges that a criminal defendant's oral notice of appeal is only effective when given "*at trial*," N.C.R. App. P. 4(a)(1) (emphasis added), and it is "unclear" whether the events of 17 March 2016 were a continuation of the probation violation hearing or a new proceeding. Accordingly, defendant explains that he filed his PWC out of "an abundance of caution to ensure that [his] right to appellate review is not lost due to technical defect in his notice of appeal." Since the State did not file a response and we have discretion pursuant to N.C.R. App. P. 21(a)(1), we conclude that defendant's PWC should be granted.

## III. Revocation of Defendant's Probation

On appeal, defendant's sole argument is that the trial court erroneously failed to exercise its statutorily mandated discretion in revoking his probation, based on the following statement at the hearing:

> THE COURT: Anything you want to tell me? He's admitted his violations, his PO officer pointed out the addendum. The addendum says abscond. Either he is or he is not. If he is the statute calls for revocation.

However, we do not reach defendant's argument, since the record reveals that the trial court lacked jurisdiction to revoke defendant's probation based on the violations alleged.

As an initial matter, neither the parties nor the trial court raised the issue of jurisdiction, and typically, we only address questions that are properly before us. *See, e.g.*, *State v. Johnston*, 173 N.C. App. 334, 338, 618 S.E.2d 807, 809 (2005) (stating that "it is not the role of the appellate courts . . . to create an appeal for an appellant" (citation, quotation marks, and brackets omitted)). "Nevertheless, subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." *State v. Kornegay*, 228 N.C. App. 320, 321, 745 S.E.2d 880, 881 (2013) (citation and quotation marks omitted). We have explained that in cases such as probation revocations, where the trial court's

> jurisdiction is statutory and the Legislature requires the [c]ourt to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction. If the court was without authority, its judgment is void and of no effect.

*Id.* at 321-22, 745 S.E.2d at 882 (citation omitted). "To establish jurisdiction over specific allegations in a probation revocation hearing, the defendant either must waive notice or be given proper notice of the revocation hearing, *including the specific grounds on which his probation might be revoked*." *Id.* at 324, 745 S.E.2d at 883 (emphasis added).

In the instant case, defendant allegedly violated various conditions of his probation in January and February of 2016. Therefore, the Justice Reinvestment Act of 2011 ("JRA") applies. *See State v. Nolen*, 228 N.C. App. 203, 204-05, 743 S.E.2d 729, 730 (2013) (noting that the JRA controls probation "violations occurring on or after 1 December 2011").

"The enactment of the JRA brought two significant changes to North Carolina's probation system." *Id.* at 205, 743 S.E.2d at 730. First, the JRA imposed stringent limits on trial courts' revocation authority. *See id.* "[I]t is no longer true that *any* violation of a valid condition of probation is sufficient to revoke [a] defendant's probation." *Kornegay*, 228 N.C. App. at 323, 745 S.E.2d at 882 (emphasis added) (citation and internal quotation marks and brackets omitted). Instead, pursuant to the JRA, trial courts are only authorized to revoke probation where the defendant: "(1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1);

(2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of CRV under N.C. Gen. Stat. § 15A-1344(d2)." *Nolen*, 228 N.C. App. at 205, 743 S.E.2d at 730 (citing N.C. Gen. Stat. § 15A-1344(a)). "For all other probation violations, the JRA authorizes courts to alter the terms of probation pursuant to N.C. Gen. Stat. § 15A-1344(a) or impose a CRV in accordance with N.C. Gen. Stat. § 15A-1344(d2), but not to revoke probation." *Id.*

Second, the JRA "introduced the term 'abscond' into our probation statutes for the first time," *State v. Hunnicutt*, 226 N.C. App. 348, 355, 740 S.E.2d 906, 911 (2013), and established the requirement that a defendant must "[n]ot abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer," pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a). Prior to the JRA, courts used the term "abscond" informally to describe violations of N.C. Gen. Stat. §§ 15A-1343(b)(2)-(3), which respectively require a probationer to, *inter alia*, "[r]emain within the jurisdiction of the court unless granted written permission to leave" and "[r]eport as directed . . . to the [probation] officer at reasonable times and places and in a reasonable manner . . . ." *See Hunnicutt*, 226 N.C. App. at 355, 740 S.E.2d at 911 (citations omitted). However, these terms are no longer interchangeable. The JRA eliminated informal absconding as a basis for revocation. *See State v. Williams*, __ N.C. App. __, __, 776 S.E.2d 741, 745 (2015) (explaining that the State's use of the phrase "absconding supervision" to describe the defendant's actions "cannot convert violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3) into a violation of N.C. Gen. Stat. § 15A-1343(b)(3a)"). Today, courts may only revoke probation for absconding based on violations of N.C. Gen. Stat. § 15A-1343(b)(3a). *Id.* at __, 776 S.E.2d at 745-46.

Although N.C. Gen. Stat. §§ 15A-1343(b)(3a) and 15A-1344(a) were both enacted as part of the JRA, the provisions have different—and sometimes conflicting—effective dates. Initially, the JRA made both changes

> effective for probation violations occurring on or after 1 December 2011. *See* 2011 N.C. Sess. Laws 192, sec. 4.(d). The effective date clause was later amended, however, to make the new absconding condition applicable only to *offenses* committed on or after 1 December 2011, while the limited revoking authority remained effective for probation violations occurring on or after 1 December 2011. *See* 2011 N.C. Sess. Laws 412, sec. 2.5.

*Nolen*, 228 N.C. App. at 205, 743 S.E.2d at 731 (citation and quotation marks omitted). Consequently, a defendant who committed the offense underlying his probation *before* 1 December 2011 but who violated the conditions of his probation *on or after* that date cannot have his probation revoked for absconding. *See id.* at 206, 743 S.E.2d at 731. This irregularity in the statutes is colloquially referred to as a "donut hole."

We recently considered the "absconding donut hole" in *State v. Hancock*, __ N.C. App. __, 789 S.E.2d 522 (2016), *disc. review denied*, __ N.C. __, 795 S.E.2d 218 (2017). In that case, the defendant committed the offense of possession with intent to sell or deliver cocaine on 18 January 2011 and was placed on supervised probation. *Id.* at __, 789 S.E.2d at 523. On 8 February and 27 March 2013, the defendant's supervising officer filed reports alleging that he had willfully violated his probation. *Id.* On appeal, we determined that because the "defendant committed his underlying offense prior to 1 December 2011, he was not subject to the JRA's 'absconding' condition of probation enacted in N.C. Gen. Stat. § 15A-1343(b)(3a)." *Id.* at __, 789 S.E.2d at 524. Moreover, because the absconding condition did not apply to him, we held that the trial court did not have the authority to revoke the defendant's probation on that basis. *Id.* at __, 789 S.E.2d at 525. Ultimately, however, we affirmed the trial court's revocation of his probation based on the defendant's commission of a new criminal offense, in violation of N.C. Gen. Stat. § 15A-1343(b)(1). *Id.* at __, 789 S.E.2d at 526. Although "the mere fact that he was charged with certain criminal offenses [wa]s insufficient to support a finding that he committed them[,]" we concluded that the trial court made an adequate "independent determination that [the] defendant committed the three offenses he was charged with . . . *as alleged in paragraphs ten and eleven of the 27 March 2013 violation report*." *Id.* (emphasis added).

Probation proceedings are "often regarded as informal or summary." *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). Nevertheless, as *Hancock* demonstrates, the JRA's notice requirements can have significant jurisdictional implications in revocation cases. *See* __ N.C. App. at __, 789 S.E.2d at 526. "Absent adequate notice that a revocation-eligible violation is being alleged, the trial court lacks jurisdiction to revoke a defendant's probation, unless the defendant waives the right to notice." *State v. Moore*, __ N.C. App. __, __, 795 S.E.2d 598, 599 (2016), *appeal docketed*, No. 22A17, __ N.C. __, __ S.E.2d __ (filed Jan. 13, 2017).

"Our Court has never explicitly held that certain 'magic' words must be used" in order to confer the trial court with jurisdiction. *Id.*; *see also*

*id.* at __, 795 S.E.2d at 600 (concluding "that where the notice fails to allege specifically which condition was violated but where the allegations in the notice could only point to a revocation-eligible violation, the notice is adequate"); *State v. Lee*, 232 N.C. App. 256, 259, 753 S.E.2d 721, 723 (2014) (holding that the trial court properly exercised jurisdiction where "the violation report specifically alleged that [the] defendant violated the condition of probation that he commit no criminal offense in that he had several new pending charges which were specifically identified"). However, we have consistently held that the trial court lacked jurisdiction to revoke probation where the underlying violation reports failed to notify the probationer that the State intended to pursue revocation-eligible violations. *See State v. Jordan*, 240 N.C. App. 90, 772 S.E.2d 13 (2015) (unpublished); *Kornegay*, 228 N.C. App at 324, 745 S.E.2d at 883 (vacating the court's judgment because the "defendant did not waive notice, and the trial court revoked [the] defendant's probation for violation of a condition not included in the State's violation reports"); *State v. Tindall*, 227 N.C. App. 183, 187, 742 S.E.2d 272, 275 (2013) (holding that the trial court lacked jurisdiction to revoke probation where the supervising officer testified that the "defendant was 'arrested' but did not allege in the violation report that she violated her probation by committing a criminal offense").

This case is functionally indistinguishable from our prior decisions holding that the trial court lacked jurisdiction to revoke probation. Here, defendant did not waive his right to notice of his alleged violations, *Kornegay*, 228 N.C. App at 324, 745 S.E.2d at 883, and the trial court mistakenly found that each violation provided sufficient grounds for revocation. Regarding the absconding provision, N.C. Gen. Stat. § 15A-1343(b)(3a) only applies to offenses committed on or after 1 December 2011. *Hancock*, __ N.C. App. at __, 789 S.E.2d at 524; *Nolen*, 228 N.C. App. at 205, 743 S.E.2d at 731. According to the judgment in the instant case, defendant committed the offense of taking indecent liberties with a child on 4 October 2011, prior to the JRA's effective date. Therefore, the absconding condition did not apply to defendant. *Hancock*, __ N.C. App. at __, 789 S.E.2d at 524; *Nolen*, 228 N.C. App. at 206, 743 S.E.2d at 731. Accordingly, the trial court erred in revoking defendant's probation based on his purported violation of N.C. Gen. Stat. § 15A-1343(b)(3a). *Hancock*, __ N.C. App. at __, 789 S.E.2d at 525.

If this case were similar to *Hancock* regarding defendant's commission of a new offense, then as in *Hancock*, we would affirm the trial court's revocation of defendant's probation. *See id.* at __, 789 S.E.2d at 526. However, this case is distinguishable. Unlike *Hancock*, where the

officer alleged that the defendant's new criminal charges violated the "commit no criminal offense" condition of probation, *id.*, here, the State failed to notify defendant that his probation might be revoked based on his trespassing arrest. Officer Gibbs did not specifically allege that defendant's trespassing arrest constituted a "new criminal offense," in violation of N.C. Gen. Stat. § 15A-1343(b)(1). While it seems abundantly clear from the transcript that the trial court's decision to revoke defendant's probation was based on absconding, the written judgment could be construed to revoke his probation based on his commission of a new criminal offense. Finding 5(a) on the AOC-CR-607 standardized form judgment states: "[t]he Court may revoke defendant's probation . . . for the willful violation of the condition(s) that he . . . not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a) . . . ." (emphasis added). Insofar as the trial court found a violation of N.C. Gen. Stat. § 15A-1343(b)(1), we hold that the violation reports were insufficient to notify defendant that the State intended to revoke his probation based on his trespassing arrest in Virginia. *See Tindall*, 227 N.C. App. at 187, 742 S.E.2d at 275; *cf. Hancock*, __ N.C. App. at __, 789 S.E.2d at 525 (stating that "a trial court's ruling must be upheld if it is correct upon any theory of law" (citation and quotation marks omitted)).

## IV. Conclusion

Since defendant did not waive his right to notice of his alleged probation violations, and the State failed to allege a revocation-eligible violation, the trial court lacked jurisdiction to revoke defendant's probation. *Kornegay*, 228 N.C. App. at 324, 745 S.E.2d at 883. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *Id.* at 323, 745 S.E.2d at 883 (citation and quotation marks omitted). Accordingly, we vacate the trial court's judgment revoking defendant's probation and remand for further proceedings.

VACATED AND REMANDED.

Chief Judge McGEE and Judge INMAN concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
PIERRE JE BRON MOORE, DEFENDANT

No. COA16-999

Filed 18 July 2017

**1. Criminal Law—overruling or reversing earlier order or ruling by another judge—motion to continue**

The trial court did not err in a prosecution for fleeing to elude arrest, resisting an officer, driving without a driver's license, and failing to heed a law enforcement officer's blue light and siren, by denying defendant's motion to continue even though defendant alleged it improperly overruled or reversed an earlier order or ruling by another judge. Based on the facts of this case, an informal initial statement by the judge at the pretrial hearing that he was willing to continue the case, based on the withdrawal of trial counsel and appointment of new counsel, was later rejected by his explicit ruling that the case was not being continued and that any decision about a continuance would be made by the judge who presided over the trial.

**2. Constitutional Law—due process—effective assistance of counsel—right to confrontation—denial of motion to continue**

The trial court did not err in a prosecution for fleeing to elude arrest, resisting an officer, driving without a driver's license, and failing to heed a law enforcement officer's blue light and siren, by concluding the denial of defendant's motion to continue did not violate his rights to due process, effective assistance of counsel, and confrontation. Defendant failed to establish that prejudice should be presumed where the charges arose from a single incident of high speed driving and the only factual issue that was contested at trial was the identity of the driver. In addition, defendant assumed it was reasonable for trial counsel to expect the case to be continued and failed to explore the possibility that his counsel was ineffective by failing to prepare for trial on the scheduled date.

**3. Evidence—video—foundation—no prejudicial error**

The trial court did not commit prejudicial error in a prosecution for fleeing to elude arrest, resisting an officer, driving without a driver's license, and failing to heed a law enforcement officer's blue light and siren, by allowing the State to introduce into evidence a copy of a convenience store surveillance video taken on an officer's cell phone even though the State failed to offer a proper foundation

for introduction of the video. Defendant failed to meet his burden of showing that there was a reasonable possibility that the jury would have failed to convict defendant absent the video evidence where he essentially admitted to being the driver of the car.

**4. Confessions and Incriminating Statements—motion to suppress —statements made to officer while transporting to law enforcement center—interrogation**

The trial court did not err in a prosecution for fleeing to elude arrest, resisting an officer, driving without a driver's license, and failing to heed a law enforcement officer's blue light and siren, by denying defendant's motion to suppress statements that he made to an officer while being transported to a law enforcement center in response to a brief exchange between the officer and his supervisor over the police radio about the location of the pertinent vehicle. Defendant failed to show that he was subjected to the functional equivalent of an interrogation, and the United States Supreme Court has held that a brief exchange between two law enforcement officers was not the functional equivalent of an interrogation.

Appeal by defendant from judgment entered 20 April 2016 by Judge R. Allen Baddour, Jr. in Orange County Superior Court. Heard in the Court of Appeals 21 March 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph E. Herrin, for the State.*

*Meghan Adelle Jones for defendant-appellant.*

ZACHARY, Judge.

Pierre Je Bron Moore (defendant) appeals from the judgment entered upon his convictions of fleeing to elude arrest, resisting an officer, driving without a driver's license, failing to heed a law enforcement officer's blue light and siren, speeding, and reckless driving. On appeal, defendant argues that the trial court erred by denying his motion for a continuance, by allowing the State to introduce into evidence a copy of a convenience store surveillance video, and by denying his motion to suppress statements made by him. We conclude that the trial court did not err by denying defendant's motion for a continuance or his motion to suppress. We further conclude that the trial court erred by admitting the video, but that its admission was not prejudicial.

I. Factual and Procedural Background

On 6 July 2015, the Grand Jury of Orange County returned indictments charging defendant with the felony of fleeing to elude arrest and with the related misdemeanors of resisting an officer, reckless driving to endanger, driving without a license, speeding, and failing to heed a law enforcement officer's blue light and siren. Mr. George Doyle was initially appointed to represent defendant, but was permitted to withdraw on 9 March 2016, at which time defendant's trial counsel, Ms. Kellie Mannette, was appointed to represent him. The charges against defendant came on for trial before a jury at the 18 April 2016 criminal session of Superior Court for Orange County, the Honorable R. Allen Baddour, Jr. presiding. Defendant did not testify or present evidence at trial. The State's evidence tended to show, in relevant part, the following.

During the early morning hours of 21 May 2015, Carrboro Police Officer David Deshaies was on patrol on Jones Ferry Road, in Carrboro, North Carolina. As Officer Deshaies drove past a Kangaroo gas station and convenience store, he noticed a man getting out of the driver's side of a silver Nissan Altima. He recognized the man as defendant from other encounters during the previous two years, and noticed that defendant was wearing a white cloth on his head. A month earlier, Officer Deshaies had attempted to stop a similar car for speeding but the car fled and, because the officer was unable to identify the driver, no one was charged as a result of that incident. At that time, Officer Deshaies had noted that the Altima had a 30 day temporary tag. Upon seeing defendant getting out of a similar silver Nissan Altima on 21 May 2015, Officer Deshaies pulled into the parking lot of the convenience store and checked the license tag number. He learned that the car, which was owned by someone other than defendant, had been issued a license plate about ten days earlier.

Officer Deshaies suspected that the Altima was the same vehicle that he had tried to stop a month earlier. When he saw defendant and another man enter the convenience store, he contacted other officers, and they agreed to watch the vehicle when it left the store and to stop the car if the driver violated any traffic laws. Officer Deshaies then drove a short distance from the store. Because he was parked several hundred yards from the gas station, Officer Deshaies did not see who was driving when the car left the store's parking lot.

After the Altima left the parking lot, it drove past Officer Deshaies at a speed above the legal speed limit. The officer contacted the law enforcement center to inform the dispatch officer that he was going to stop the Nissan. When Officer Deshaies activated his blue light and siren, the

car accelerated rapidly away from him. Officer Deshaies followed the car for several miles, during which time he saw it run a red light and accelerate to speeds of over 110 miles per hour. Officer Deshaies chased the car for several minutes before his supervisor directed him to discontinue the attempt to stop the vehicle. Officer Deshaies then returned to the Kangaroo gas station and convenience store where he had first noticed the car. Officer Deshaies described defendant's appearance to the store's clerk, who told the officer that he knew a person who fit the description, and that he would recognize the person if he saw him again.

On 22 May 2015, Officer Deshaies returned to the Kangaroo store and asked the manager if he could review the store's video surveillance footage from the night before. Officer Deshaies was permitted to view the video footage. However, the manager of the store told Officer Deshaies that the ownership of the Kangaroo store was in the process of being transferred to a different company and that, as a result of corporate policies involved in the transfer of ownership, the manager of the Kangaroo store lacked the authority to make a copy of the video. Officer Deshaies then used the video camera in his cell phone to copy the video, and downloaded the video from his cell phone to a computer to make a digital copy. Officer Deshaies testified that the video was an accurate representation of the video that he reviewed at the store.

The trial court allowed the copy of the surveillance video to be played for the jury, over defendant's objection. The video depicts footage of the convenience store premises taken by four different cameras recording views of the parking lot and the interior of the store. The footage includes images of a man with a white cloth on his head getting out of the driver's side of a car. Officer Deshaies identified this man as defendant. Officer Deshaies testified that he had personally observed defendant get out of the car but that he had moved his patrol vehicle out of view of the store before defendant and the other man got back into the car and drove away. The video also showed defendant getting into the driver's side of the car before it left the parking lot.

The clerk testified that on 21 May 2015 he was employed at the Kangaroo gas station and convenience store on Jones Ferry Road, in Carrboro. Defendant had been a "regular customer" at the store and at around 1:00 a.m. on 21 May 2015, defendant and another man made a brief visit to the store. The clerk identified defendant in court and on the copy of the surveillance video.

Carrboro Police Officer Russell Suitt testified that he and defendant had attended high school together. Officer Suitt was not involved in the

car chase on 21 May 2015, but the next day he learned that there were outstanding warrants for defendant's arrest. That morning, Officer Suitt saw defendant walking on Homestead Road in Chapel Hill. Officer Suitt stopped defendant and informed him that there were warrants for his arrest. Defendant was arrested and placed in Officer Suitt's patrol vehicle without incident. As Officer Suitt was transporting defendant to the law enforcement center, another officer spoke to Officer Suitt over the police radio in the car, and asked Officer Suitt if he had information about the location of the vehicle that was involved in the incident the night before. Defendant spoke up from the back seat of the patrol vehicle and said that the car was in a secret location. Defendant also told Officer Suitt that he had sped away from the law enforcement officers the night before because he feared being charged with impaired driving.

On 20 April 2016, the jury returned verdicts finding defendant guilty of the charged offenses. The trial court arrested judgment on the charges of speeding and reckless driving, and consolidated the remaining charges for sentencing. The court sentenced defendant to a term of eight to nineteen months' imprisonment, to be served at the expiration of another sentence that defendant was then serving for an unrelated charge. Defendant noted a timely appeal to this Court.

## II. Denial of Motion for Continuance

### A. Standard of Review

On appeal, defendant argues that the trial court erred by denying his motion to continue the trial of this case, on the grounds that (1) the trial court lacked the authority to enter an order that overruled another superior court judge, and (2) the denial of defendant's continuance motion deprived him of his constitutional right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 23 of the North Carolina Constitution. N.C. Gen. Stat. § 15A-952(g) (2015) addresses a trial court's determination of whether to allow a continuance and provides that "the judge shall consider at least the following factors in determining whether to grant a continuance:"

> (1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; [and]
>
> (2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation[.]

The general standard of review of a trial court's ruling on a continuance motion is well-established:

> It is, of course, axiomatic that a motion for a continuance is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent a gross abuse. It is equally well established, however, that, when such a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case. Denial of a motion for a continuance, regardless of its nature, is, nevertheless, grounds for a new trial only upon a showing by defendant that the denial was erroneous and that [his] case was prejudiced thereby.

*State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981) (citations omitted).

B. Trial Court's Authority to Deny Defendant's Motion to Continue

**[1]** Defendant argues that the trial court's denial of his motion to continue constituted an improper overruling or reversal of an earlier order or ruling by another judge. Defendant is correct that:

> The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

*Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). In this case, defendant asserts that a statement by the judge who presided over a pretrial hearing constituted a "ruling" or "decision" which could not be modified by another superior court judge. Upon careful consideration of the facts of this case, we conclude that this argument lacks merit.

Following defendant's arrest on 22 May 2015, Mr. George Doyle was appointed to represent defendant on the charges that are the subject of this appeal, and that were charged in Orange County Files Nos. 15 CRS 51309 and 51310. The record indicates that Mr. Doyle also represented defendant on what is described by the parties as an unspecified drug-related offense that was charged in Orange County File No. 14 CRS 52224. Defendant was later charged with first-degree murder in an unrelated case. On 9 March 2016, defendant appeared in superior court before the Honorable James E. Hardin, Jr. During this hearing, Mr. Doyle

moved to withdraw as counsel and asked that Ms. Kellie Mannette, who was defendant's counsel on the murder charge, be appointed to represent defendant on the less serious charges on which Mr. Doyle had been appointed to represent defendant. During discussion of this possibility, Judge Hardin made a comment indicating a willingness to continue the trial of the charges on which Mr. Doyle represented defendant. On appeal, defendant contends that this remark constituted a decision or ruling establishing that defendant's trial would be continued. We disagree, and conclude that this preliminary and informal remark was clearly disavowed by Judge Hardin's explicit ruling that the case was not being continued and that any decision about a continuance would be made by the judge who presided over the trial.

We have set out a significant portion of the transcript of the hearing in order to explain the reasoning behind our conclusion that Judge Hardin did not order or rule that the present case be continued. We are not holding that Judge Hardin issued an oral ruling or order that was not reduced to writing, but that the court *did not* order that the case was continued. At the outset of the hearing, the prosecutor informed the court of the issues for resolution:

> THE COURT: Yes, sir.
>
> MR. PROCTOR: . . . Thank you. This is Pierre Moore. The matter that appears on the docket is . . . first degree murder. Ms. Mannette was appointed in district court. This is technically his first appearance in superior court, so we need to address that. And then [the] State has filed notice for a Rule 24 [hearing], and I have an order continuing that to September 13th[.] . . .
>
> THE COURT: May I have that file?
>
> MR. PROCTOR: And I believe he has some other [criminal charges] that Mr. Doyle would like to address the counsel issue on.

Judge Hardin then questioned defendant and determined that he wished to be represented by his appointed counsel, Ms. Mannette, on the charge of first-degree murder. The next matter addressed by the court was the State's motion to continue a pretrial Rule 24 hearing in the murder case for six months, until September 2016:

> THE COURT: All right. [Defendant's representation by Ms. Mannette on the charge of first-degree murder is] allowed,

> Madam Clerk. Now, do I understand with respect to the Rule 24 hearing, you want to do that when?
>
> MR. PROCTOR: I would just like to continue that to September 13th of 2016. I do have an order that, I believe, would be consented to, if I may approach.
>
> THE COURT: Ms. Mannette?
>
> MS. MANNETTE: We do consent.
>
> . . .
>
> THE COURT: That's allowed, Madam Clerk. The Rule 24 hearing will be conducted on -- during the week of September the 13th.

The next matter for consideration was a defense motion pertaining to forensic testing of certain evidence. The prosecutor explained that "Ms. Mannette had filed and Your Honor had granted a preservation order that dealt with [forensic testing.]" The parties discussed the proposed methodology for testing the ballistics evidence and, because the issue was still under discussion, Judge Hardin concluded that there was no need to amend his previous order at that time:

> THE COURT: All right. Well, I don't see that I've got to alter the order at this point[.] . . . So once you all have made that decision, if you want to prepare an order, I'll be glad to consider it.
>
> MR. PROCTOR: Okay.
>
> THE COURT: But at this point, I don't think there's anything that needs to be addressed further.

Our Supreme Court has held that "a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its ruling in the minutes being kept for that session." *State v. Miller*, 368 N.C. 729, 738, 783 S.E.2d 194, 200 (2016) (citing *State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012)). Accordingly, after Judge Hardin ruled that Ms. Mannette would represent defendant on the charge of first-degree murder and again when he ruled that the Rule 24 hearing would be continued, he specifically directed "Madame Clerk" to record his ruling. After resolving the matters discussed above, the court addressed Mr. Doyle about the charges on which he had asked to be removed as counsel:

THE COURT: Okay. Now, with respect to the other pending charges of which Ms. Mannette does not represent the Defendant, I am aware that Mr. Doyle represents the Defendant in those items, but they are not related in any way to the homicide charge. Is that what you understand, Mr. Proctor?

MR. PROCTOR: That's my understanding and my recollection. . . . I believe those matters are set for trial April 18th, so just to make sure everyone's on the same page with posture of those charges.

THE COURT: But they have no relation to this homicide charge. That's what I want to make sure the record's clear about.

MR. PROCTOR: That's -- yes.

. . .

THE COURT: Now, Mr. Doyle, you'd indicated earlier in the week that you'd had some discussions with Ms. Mannette and that she was willing to undertake the representation of Defendant in these other pending matters. And once -- I miss recalling what the discussion was.

MR. DOYLE: That's correct, Your Honor. And I believe Your Honor has those files in front of you.

. . .

THE COURT: Okay.

MR. DOYLE: My basic argument to Your Honor is that, as you know, Mr. Moore faces perhaps the ultimate penalty under our law and, therefore, I am particularly sensitive and cognizant to protecting his rights. And, also, for judicial economy, I think it makes more sense for Ms. Mannette to just be the air traffic controller of everything going on in his life right now. So I would move to withdraw and ask that you appoint Ms. Mannette to those files, as appropriate.

MS. MANNETTE: . . . Your Honor, . . . just for the record, I've been speaking to Mr. Doyle about the posture of these cases. And my understanding is that they were heading towards a resolution on those cases. I will let the Court

> know that, if they are not able to come to a non-trial resolution, I certainly will not be prepared in a month to try those cases. I do want that on the record. I don't know that that's going to be an issue here, but I did want to put that on the record. I'll leave it in Your Honor's discretion, whether or not to grant this motion or we can continue to work together but on the separate cases.
>
> . . .
>
> THE COURT: . . . Mr. Proctor, now understanding what -- the more nuanced version of where we are postured . . . [d]o you want to be heard?
>
> MR. PROCTOR: My concern is -- I mean, and it's really -- I don't know how much standing the State has in regards to this -- is that they are set for trial. If they were in an administrative posture, I would -- I wouldn't voice any concern, essentially. But given that they're in trial posture, I don't know if we come [to] April 18th and the State's ready to proceed and Ms. Mannette's not, now --
>
> THE COURT: It's going to get continued. That's the bottom line.

Defendant's contention that Judge Hardin ruled that the trial of these charges would be continued is based entirely upon the court's comment that "[i]t's going to get continued. That's the bottom line." For several reasons, we reject this argument.

We note first that, unlike the instances discussed above, upon making this remark the court neither directed the clerk to make a notation nor stated that the case would be continued until a specific date. This is understandable, given that defense counsel stated that she did not expect to be ready for trial in a month, but did not make a motion for a continuance. As a result, the trial court was not presented with a specific question for resolution. Defense counsel's failure to make a motion for continuance is not a mere procedural technicality. Had defendant's counsel moved to continue the case, the court could have entertained opposing arguments on this question, during the course of which defendant's counsel would likely have been asked to explain why a month would not be sufficient time to prepare for trial. And, if the court had continued the case, the prosecutor would have had notice of the new trial date on which to secure the attendance of witnesses.

In addition, Judge Hardin's statement that "[i]t's going to get continued" was, at most, an indication that at some future time the trial of the charges upon which Mr. Doyle represented defendant would be continued. However, the record is clear that Judge Hardin did not enter a continuance order or announce at the hearing that the case was being continued at that time. To the extent that defendant intends to argue that Judge Hardin was "ruling" that in the future the trial court would be required to continue the case, defendant has not cited any authority suggesting that one superior court judge may order that another judge enter a particular ruling in the future, regardless of the circumstances that may exist at that time.

Moreover, a review of the transcript of the rest of the hearing makes it clear that Judge Hardin did not rule that the case would be continued, but specifically ordered that the charges would remain scheduled for April. After initially making the statement discussed above, the court questioned Mr. Doyle further about his request to withdraw as counsel. The court expressed concern about the possibility of further delay in the disposition of these charges:

> THE COURT: . . . I guess what I'm not completely clear about is, Mr. Doyle, you've been a lawyer a long time. You're a very experienced litigator.
>
> MR. DOYLE: Thank you, Your Honor. I'm afraid I've been a lawyer a long time.
>
> THE COURT: . . . So I'm trying to understand, given that this other set of cases that you represent him on are -- they've got some age on them now, they're ready to be tried -- why it's necessary that Ms. Mannette take a completely unrelated set of cases along with what she's already going to be handling, so.
>
> MR. DOYLE: I think, Your Honor, if he wasn't charged with first degree murder, that would make complete sense. But in light of the fact that I need to be so concerned about any admissions that I make on his behalf, we have had plea negotiations. . . . I hope I would not intentionally make any mistakes, but unintentional with the outcome on these other cases being so severe and it just doesn't -- you know, the State keeps telling us court-appointed lawyers we've got to find every way to save cost. And it would just seem more efficient from a cost-wise [sic] to have one attorney represent him on all matters.

> THE COURT: . . . [T]hat is a more hollow argument with me. Since you've already done the work, you're ready to try the case. It can be tried in April. And now Ms. Mannette has to get up to speed and spend hours on that second unrelated set of cases so that she's prepared to try it. I don't know that we're saving any cost there. So if that's the argument, I have some issue about it.
>
> . . .
>
> MR. DOYLE: Well, the cases are -- in terms, it's the first setting on the trial docket, Your Honor. I don't -- from my discussions with Mr. Nieman over these last months, I don't get the impression that they're anywhere towards the stop -- top of the trial calendar. As you know, I have a -- I have a trial starting on March the 28th, and I am sure that I would not be able to do a quick turnaround and try this case, as well as another case in Chatham County that you set for trial for April 11th. So for me to do three jury trials in a 30-day period, I'm not able to do that as a solo practitioner. So in that sense, I guess I'm moving to continue these cases off the trial calendar, if we want to discuss that.
>
> THE COURT: Mr. Proctor, was there any other input you wanted to provide?
>
> MR. PROCTOR: Not other than I would just tell Your Honor, when Mr. Nieman and myself, along with the elected District Attorney, Mr. Woodall, discussed the fact that Mr. Moore has pending cases, Mr. Woodall's directive was just proceed on them as you normally would. They're unrelated. They're set in trial posture. So we're not going to treat them any differently and not -- we're not going to just simply put them on the back burner and wait for the murder case to be resolved. So that would be the input from the State.
>
> (Emphasis added.)

Thus, when Mr. Doyle moved to continue the trial of the charges on which he represented defendant in the event that he remained as defendant's counsel, the prosecutor argued that the State intended to proceed with the trial of these charges and opposed continuing the case until resolution of defendant's homicide charge.

Judge Hardin then questioned defendant as to whether he wished for Ms. Mannette to represent him on the non-homicide charges, which the court referred to as the "unrelated drug charges":

> THE COURT: All right. Well, I've heard from all the lawyers now, but I hadn't heard from Mr. Moore as to what his choices are. Mr. Moore, please stand up.
>
> (The Defendant complied.)
>
> . . .
>
> THE COURT: So until I make a decision about which lawyer represents you on the unrelated drug cases, Mr. Doyle is your lawyer. So if I ask you something you don't understand, discuss it with him. So long and short of it is, I'm willing to consider what your requests are regarding the appointment of counsel. Mr. Doyle, in essence, is asking that he be relieved from representing you in the unrelated drug cases and that Ms. Mannette be appointed. She's also making that request because they believe that it's to your benefit. Are you making that request, as well?
>
> DEFENDANT: Yes.
>
> (Emphasis added).

After hearing from all parties, Judge Hardin entered his order with respect to appointment of counsel and expressly ruled that the trial of the non-homicide cases was not being continued:

> THE COURT: All right, Madam Clerk. In the Court's discretion, as it relates to cases 14 CRS 52224 and 15 CRS 51309 and 51310 -- in the Court's discretion, Mr. Doyle is relieved and is allowed to withdraw as counsel. Ms. Mannette is appointed as counsel and will handle these matters along with the homicide matter, to which she's already appointed.
>
> MR. DOYLE: I have a proposed order, if I may approach.
>
> THE COURT: Yes, sir.
>
> MR. DOYLE: Thank you.
>
> THE COURT: All right. As to the drug cases, they're still set in April. So if there's some issue we need to address further, I guess it can be done by whomever is -- will be the presiding judge at that session of court.

MS. MANNETTE: Okay.

THE COURT: Madam Clerk, Ms. Mannette's the attorney of record in all these matters.

MS. MANNETTE: Thank you, Judge.

(emphasis added).

We first note that during this hearing Judge Hardin referred generally to the charges on which Mr. Doyle was granted permission to withdraw as "the drug cases" in the plural. However, the cases at issue were charged in two court files charging the instant traffic offenses and a single court file charging what has been described as a drug-related case. Therefore, the court's reference to "cases" logically applies to all three of the court files, rather than to the single court file that charged a drug-related offense. Nonetheless, on appeal, defendant contends that in its order the court was intentionally making a distinction between the charge that the parties have described as drug-related and the other two files charging the traffic offenses that are at issue in this appeal. Defendant asserts that "[a]s to the offenses giving rise to this appeal, Judge Hardin stated: 'It's going to get continued. That's the bottom line.' " Defendant thus posits that the court specifically ruled that the traffic cases would be continued, but that the drug-related charge would not. We find no basis in the transcript for this contention.

Prior to granting Mr. Doyle's motion to withdraw and appointing Ms. Mannette to represent defendant on the charges from which Mr. Doyle had asked to withdraw, Judge Hardin questioned defendant and also heard from Ms. Mannette, Mr. Doyle, and the prosecutor. At no time did any of those present make *any* reference to the fact that there were two types of charges involved, or draw any distinction between them. Specifically, Mr. Doyle asked to withdraw as counsel for all pending charges, without stating that they involved different offenses. When Judge Hardin indicated his concern about this, Mr. Doyle "mov[ed] to continue these cases off the trial calendar" without distinguishing among them. Ms. Mannette spoke to the court generally about "these cases" and made no reference to there being two categories of charges. In response, Judge Hardin made the comment that "[i]t's going to get continued" without distinguishing between the traffic charges and the drug-related case. The prosecutor stated that "they are set for trial" on 18 April 2016, and did not indicate that the trial date referred only to some of the pending charges. The prosecutor also told the court that he had been directed to proceed with the "pending cases" without regard to the first-degree murder charge lodged against defendant.

We have carefully reviewed the transcript of this hearing and find *no* reference by any of the parties or the court making any distinction between the traffic charges and the drug-related offense. In fact, neither Mr. Doyle, Ms. Mannette, nor the prosecutor mentioned that the pending charges encompassed two categories of charges. As a result, the transcript fails to contain any basis upon which to find that any of those present intended that the traffic and drug charges be treated differently. Instead, all of the parties and the court treated the charges on which Mr. Doyle represented defendant as a unitary subject for resolution, and there is no dispute that all of the charges were set for trial in April 2016.

Moreover, Judge Hardin's reference to the non-homicide charges as "drug cases" was *not* limited to the court's order allowing Mr. Doyle to withdraw. When the court addressed defendant on the subject of representation by counsel on all of the non-homicide cases, he characterized these charges as the "unrelated drug cases." We conclude that Judge Hardin's reference to "the drug cases" being "set in April" was an imprecise or inaccurate reference to all of the charges upon which Mr. Doyle had previously represented defendant.

It is also significant that, in contrast to the court's earlier remark that "the bottom line" was that the case "was going to get continued," when Judge Hardin reached a final decision and entered an order, he directed the clerk to note his decision in the record. In his order, Judge Hardin specifically ruled that the cases were "still" set in April, indicating that he had decided *not* to continue them. The court also expressly stated that if other issues arose, which would include a future continuance motion, the resolution of those matters would be the responsibility of "the presiding judge at that session of court." We conclude that Judge Hardin did not enter an order or make a ruling that this case was continued; that the court expressly noted that the case was not continued and appropriately left future decisions in the hands of the trial judge; and that Judge Baddour did not overrule the order or ruling of another superior court judge by denying defendant's motion to continue.

Moreover, defense counsel was present at this hearing and acknowledged Judge Hardin's ruling that she was appointed to represent defendant but that the cases were "still set in April." Under these circumstances, it would be unreasonable for defense counsel either to treat the court's initial comment as a "ruling" or to proceed on the assumption that there was "an understanding" that the traffic charges would be continued. Defendant is not entitled to relief on the basis of this argument.

C. Defendant's Constitutional Right to Effective Assistance of Counsel

**[2]** On appeal, defendant argues that his "rights to due process, to the effective assistance of counsel, and to confrontation were violated." Defendant urges that prejudice from the denial of the continuance motion "should be presumed" and, quoting *State v. Rogers*, 352 N.C. 119, 125, 529 S.E.2d 671, 675 (2000), contends that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote." We have considered defendant's arguments and conclude that the trial court did not err by denying defendant's motion to continue, and that the facts of this case do not present the type of highly unusual situation in which prejudice should be presumed.

The refusal to grant a continuance may, in certain factual circumstances, violate a defendant's constitutional rights. "The defendant's rights to the assistance of counsel and to confront witnesses are guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and by sections 19 and 23 of Article I of the Constitution of North Carolina. Implicit in these constitutional provisions is the requirement that an accused have a reasonable time to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993) (internal quotation omitted). "[T]he constitutional guarantees of assistance of counsel and confrontation of witnesses include the right of a defendant to have a reasonable time to investigate and prepare his case, but no precise limits are fixed in this context, and what constitutes a reasonable length of time for defense preparation must be determined upon the facts of each case." *Searles*, 304 N.C. at 153-54, 282 S.E.2d at 433 (citation omitted). The Supreme Court of North Carolina has explained:

> To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." "[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." "[A] postponement is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts." . . . Continuances should not be granted unless the reasons therefor are fully established.

*State v. McCullers*, 341 N.C. 19, 31-32, 460 S.E.2d 163, 170 (1995) (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526

(1986), *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986), and *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976)) (emphasis in original).

Thus, as a general rule, in order to obtain relief based on a court's denial of his motion for a continuance, a defendant must demonstrate that the trial court erred by denying the continuance and also that the defendant was prejudiced by the denial. However, where the record shows as a matter of law that defense counsel did not have an adequate time within which to prepare for effective representation of the defendant, our appellate courts have not required the defendant to show prejudice. For example, in *Rogers*, the Court stated that:

> While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed without inquiry into the actual conduct of the trial when the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation only when surrounding circumstances justify this presumption of ineffectiveness.

*Rogers* at 125, 529 S.E.2d at 675 (internal quotation omitted). Defendant argues that, as in *Rogers*, we should "presume" prejudice rather than examining the actual conduct of the trial. However, the facts of *Rogers* are easily distinguished from those of the present case. The opinion of our Supreme Court in *Rogers* addressed a situation in which the defense attorneys were appointed "to a case involving multiple incidents in multiple locations over a two-day period for which they had only thirty-four days to prepare" for the "bifurcated capital trial" of a "complex case involving . . . many witnesses[.]" The Court expressly based its holding upon "the unique factual circumstances" of the case. *Rogers*, 352 N.C. at 125-26, 529 S.E.2d at 675-76. The instant case does not present the "unique factual circumstances" that were present in *Rogers*.

Defendant argues that if we find that the trial court erred by denying his motion to continue, prejudice should be presumed. In support of this argument, defendant contends that (1) prior to trial, defense counsel failed to interview witnesses, review reports, or conduct research and thus was not prepared for trial, and that (2) defense counsel's failure to prepare for trial was based upon her "reasonable" reliance upon Judge Hardin's comment at the 9 March 2016 hearing. Defendant asserts that "[w]ithout inquiring into the conduct of the trial, based on the record established at the 9 March 2016 hearing, this Court should reverse the

judgment and remand for a new trial." However, in examining the surrounding circumstances we must determine whether defense counsel had adequate time to prepare, rather than whether counsel used the time wisely:

> The question in this context is whether defendant had "ample time to confer with counsel and to investigate, prepare and present his defense," not whether the trial counsel properly used the time given to adequately investigate and prepare - that question is considered under the normal test for ineffective assistance of counsel.

*State v. King*, 227 N.C. App. 390, 395, 742 S.E.2d 315, 318-19 (2013) (quoting *State v. Williams*, 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002)). In this case, defendant has not articulated any argument related to the factual circumstances of this case to explain why a month was not sufficient time to prepare for trial. Instead, defendant essentially concedes that his trial counsel failed to prepare for trial, but attempts to justify this by reference to the court's comment that "the bottom line" was that "[i]t's going to get continued."

As discussed in detail above, at the hearing on 9 March 2016 Judge Hardin did not continue the case or enter an order purporting to dictate that at some future date the trial court would be required to continue the case when it was called for trial. After initially making an informal comment suggesting an inclination to continue the trial of the various charges from which Mr. Doyle sought to withdraw as counsel, the court decided not to continue the case and entered an order clearly stating that the trial was still set for April 2016. In addition, the prosecutor made it clear at the March hearing that he would oppose a continuance. Thus, it was not reasonable for defense counsel to assume, on the basis of a remark that was not consistent with Judge Hardin's final ruling, that defense counsel would be granted a continuance on 18 April 2016. We conclude that defendant has failed to establish that the factual circumstances of the present case are such that prejudice should be presumed as a result of the denial of defendant's continuance motion.

We further conclude that the trial court did not err by denying defendant's motion to continue. When the case was called for trial on 18 April 2016, defense counsel orally moved for a continuance, explaining that she had hoped to resolve the charges without a trial, but had learned that morning that defendant would not accept the State's plea offer. Defense counsel acknowledged that she had received discovery a month earlier, on the day she was appointed. She added, however, that

there was a "lay witness" whom she had not interviewed, a suppression motion for which she had not conducted the necessary research, and other unspecified "motions in limine that need to be filed and argued." Defense counsel did not identify the witness or articulate any material factual issue upon which this witness might testify.

Defendant's counsel also told the trial court that she had agreed to represent defendant "with the understanding" that if the parties could not reach a non-trial disposition, she "would not be prepared to try the case[.]" As discussed above, the record belies any suggestion that the parties had reached an "understanding" that the case would be continued. Nor did defendant's counsel proffer an explanation, other than her reliance upon Judge Hardin's comment at the earlier hearing, for her failure to interview the witness, to conduct the necessary research, to file the appropriate motions in limine, or to submit a properly supported written motion for continuance.

N.C. Gen. Stat. § 15A-952(g)(2) directs a trial court to consider, in ruling on a motion for continuance, "[w]hether the case taken as a whole is so unusual and so complex . . . that more time is needed for adequate preparation[.]" In this case, defendant did not argue at the pretrial hearing that the trial of these charges was unusual or complex. The charges lodged against defendant all arose from a single incident of high speed driving and the only factual issue that was seriously contested at trial was the identity of the driver. We conclude that the trial court did not err by denying defendant's motion to continue.

Moreover, even assuming, *arguendo*, that it was error to deny defendant's motion to continue, defendant has failed to show any resultant prejudice. In his appellate brief, defendant does not identify specific factual issues that might have been resolved differently if his counsel been granted a continuance. Defendant contends, however, that "assuming *arguendo* that prejudice cannot be presumed, specific deficiencies show ineffective assistance of counsel." Thus, the prejudice that defendant has identified on appeal is his assertion that his counsel was ineffective at trial, based upon counsel's failure to prepare for trial. The standard for a claim of ineffective assistance of counsel (referred to by the acronym IAC) is well-established:

> To prevail in a claim for IAC, a defendant must show that his (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*State v. Smith*, 230 N.C. App. 387, 390, 749 S.E.2d 507, 509 (2013) (applying the analysis of *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)), *cert. denied*, 367 N.C. 532, 762 S.E.2d 221 (2014).

In this case, defendant notes that prior to trial defense counsel had not interviewed an unspecified witness or reviewed police reports, that counsel failed to submit a signed affidavit in conjunction with a suppression motion, and that counsel failed to support the suppression motion or the motion to exclude admission of the convenience store surveillance video with citation to legal authority. As discussed elsewhere in this opinion, we conclude that the trial court did not err by denying defendant's suppression motion. We also conclude that the admission of the video, although error, was not prejudicial, and defendant does not argue that a continuance would have allowed defendant to obtain evidence that would have been relevant to our prejudice analysis. Therefore, even if counsel was ineffective by failing to file an affidavit with the suppression motion or to support the pretrial motions with citation to legal authority, defendant cannot show prejudice, given that we have concluded that the trial court reached the correct result on the suppression motion and that defendant was not prejudiced by the admission of the video.

In regard to defense counsel's failure to interview a witness, defendant has not offered any argument pertaining to the significance of the unnamed witness or on whether counsel's performance "fell below an objective standard of reasonableness." *Id.* In addition, defendant's appellate arguments are premised upon his contention that it was reasonable for defense counsel to assume that the trial would be continued. As a result, defendant has not explored the possibility that his counsel was ineffective by failing to prepare for the possibility that the case would be tried on the scheduled date.

"As a general proposition, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Hernandez*, 227 N.C. App. 601, 609, 742 S.E.2d 825, 830 (2013) (internal quotation omitted). We conclude that at this juncture defendant's claim of ineffective assistance of counsel should be dismissed without prejudice to his right to raise it in a subsequent motion for appropriate relief. For the reasons discussed above, we conclude that defendant is not entitled to relief based upon the trial court's denial of his motion to continue.

## III. Admission of Video

**[3]** The admission of photographic and video evidence is governed by N.C. Gen. Stat. § 8-97 (2015), which provides that:

> Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.

N.C. Gen. Stat. § 8-97 provides that a photograph may be introduced for either illustrative or substantive purposes. "Rule 901 of our Rules of Evidence requires authentication or identification 'by evidence sufficient to support a finding that the matter in question is what its proponent claims.' " *State v. Murray*, 229 N.C. App. 285, 288, 746 S.E.2d 452, 455 (2013) (quoting N.C. Gen. Stat. § 8C-1, Rule 901)).

"Video images may be introduced into evidence for illustrative purposes after a proper foundation is laid. N.C. Gen. Stat. § 8-97 (2015). The proponent for admission of a video lays this foundation with 'testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes).' " *State v. Fleming*, __ N.C. App. __, __, 786 S.E.2d 760, 764-65 (2016) (quoting *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990)).

In *State v. Snead*, 368 N.C. 811, 783 S.E.2d 733 (2016), our Supreme Court addressed the requirements for introduction of a video as substantive evidence:

> Rule 901(a) requires that evidence be authenticated by showing "that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a) (2015). . . . Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process under Rule 901(b)(9). . . . Evidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission as substantive evidence.

*Snead*, 368 N.C. at 814, 783 S.E.2d at 736 (internal quotation omitted). *Snead* held that the testimony offered at trial was sufficient to authenticate the video:

> . . . [The witness's] testimony was sufficient to authenticate the video under Rule 901. [The witness] established

> that the recording process was reliable by testifying that he was familiar with how Belk's video surveillance system worked, that the recording equipment was "industry standard," that the equipment was "in working order" on 1 February 2013, and that the videos produced by the surveillance system contain safeguards to prevent tampering. Moreover, [the witness] established that the video introduced at trial was the same video produced by the recording process by stating that the State's exhibit at trial contained exactly the same video that he saw on the digital video recorder. . . . [The witness's] testimony, therefore, satisfied Rule 901, and the trial court did not err in admitting the video into evidence.

*Snead* at 815-16, 783 S.E.2d at 737.

In the present case, the evidence concerning the admissibility of the video consisted of the following. Officer Deshaies testified that the day after the incident giving rise to these charges, he asked the manager of the Kangaroo convenience store for a copy of the surveillance video made by cameras at the store. The manager allowed Officer Deshaies to review the video, but was unable to copy it. Officer Deshaies used the video camera function on his cell phone to make a copy of the surveillance footage, which was copied onto a computer. At trial he testified that the copy of the cell phone video accurately showed the contents of the video that he had seen at the store. The store clerk also reviewed the video, but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he observed on 21 May 2015.

A careful review of the transcript in this case reveals that no testimony was elicited at trial concerning the type of recording equipment used to make the video, its condition on 21 May 2015, or its general reliability. No witness was asked whether the video accurately depicted events that he had observed, and no testimony was offered on the subject. We conclude that the State failed to offer a proper foundation for introduction of the video as either illustrative or substantive evidence.

On appeal, the State contends that the clerk "testified that the events contained on the video copy made by Officer Deshaies were an accurate portrayal of what he had seen on the original videotape and had witnessed within the store." This assertion is inaccurate. The clerk testified that defendant was shown on the video, but was not asked whether the video accurately depicted events he observed on 21 May 2015, and did

not volunteer testimony of this nature. We hold that the trial court erred by admitting the video into evidence.

We next consider whether the introduction of the video was prejudicial. Defendant did not object to the admission of the video on constitutional grounds. Regarding prejudice from errors that do not arise under the state or federal constitution, N.C. Gen. Stat. § 15A-1443(a) states that:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

In this case, the primary issue for the jury to resolve was whether the State had shown beyond a reasonable doubt that defendant was the driver of the car that sped away from Officer Deshaies on 21 May 2015. In its appellate brief, the State argues that the video was admissible and does not address the issue of prejudice. Defendant argues that, absent the admission of the video there is a reasonable possibility that the jury would not have convicted him. We have considered the admission of the video in the context of the other evidence introduced at trial, and conclude that it was not prejudicial.

The evidence, other than the video, that pertained to the issue of whether defendant was the driver, consisted of the following. Officer Deshaies testified that when the car pulled into the convenience store, he saw defendant getting out of the car on the driver's side. This was direct evidence that defendant was driving the car a few minutes before it sped away from the store. In addition, as discussed in detail below, at the time of his arrest defendant essentially confessed to having been the driver, and told the arresting officer "that the only reason he ran from officers the night of 5/21/2015 was because he had been drinking and did not want to deal with the driving while impaired charges." This statement was a direct admission of the fact that he was driving the car the night before, given that a passenger in the car would not be charged with impaired driving. The credibility of the officer to whom defendant made this admission was not seriously challenged. No evidence was offered tending to show that a person other than defendant was driving. However, defendant has pointed out that defendant was not the owner of the car and that the jury asked to review all of the videos during its

deliberations, in support of his argument that admission of the video was prejudicial.

We have evaluated the extent to which the video may have played a role in the jury's decision to convict defendant, particularly given that defendant essentially confessed to being the driver of the car. We conclude that defendant has failed to meet his burden of showing that there is a reasonable possibility that the jury would have failed to convict defendant absent the video evidence.

IV. Denial of Suppression Motion

**[4]** Prior to trial, defendant moved to suppress the statements that he made to Officer Suitt while the officer was transporting him to the law enforcement center. The trial court conducted a hearing on defendant's suppression motion on the day that the trial began and denied defendant's motion. On appeal, defendant argues that his statements were made in response to police interrogation or its functional equivalent, in violation of his right under the Fifth Amendment to the United States Constitution to avoid self-incrimination. We disagree.

In *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 707 (1966), the United States Supreme Court held that:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

"The rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by the police only applies to custodial interrogation." *State v. Brooks*, 337 N.C. 132, 143, 446 S.E.2d 579, 586 (1994). *Miranda* also held, as relevant to the present case, that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda*, 384 U.S. at 478, 16 L. Ed. 2d at 726.

In the present case, there is no dispute that when defendant made the inculpatory statements to Officer Suitt he was in custody and had not been apprised of his *Miranda* rights. Thus, the dispositive issue is whether defendant was subjected to interrogation. "The Supreme Court

has defined the term 'interrogation' as follows: 'Any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *State v. Brewington*, 352 N.C. 489, 503, 532 S.E.2d 496, 504 (2000) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)).

In this case, defendant made inculpatory statements after being arrested and while being transported to the law enforcement center. These statements were made in response to a question from Officer Suitt's supervising officer over the police radio. At the hearing on defendant's suppression motion, Officer Suitt testified as follows:

> MR. PROCTOR: Okay. And what happened next [after defendant was secured in the patrol vehicle]?
>
> OFFICER SUITT: . . . [W]e were en route to the police department and Mr. Moore heard -- my lieutenant was asking about the vehicle, maybe see if we could locate the vehicle. He asked if Mr. Moore had said anything about where the vehicle was located. Well, obviously the speaker in my patrol car, anybody can hear that's inside the car. Mr. Moore stated that we wouldn't find the vehicle, it was possibly in a secret spot, as stated in -- in the report.
>
> MR. PROCTOR: Okay. And to be clear, was that in response to any question that was being asked of him?
>
> OFFICER SUITT: It was not. I did not ask him any questions. I believe it would be in response to my supervisor, lieutenant, asking the question over the radio to me "Did he say anything about where the car was located?" And his response was in response to that.
>
> MR. PROCTOR: Okay. What happened next?
>
> OFFICER SUITT: Still en route to the police department, Mr. Moore stated, as I put in the report, that the only reason that he ran from officers the night prior was because he didn't want to get the impaired driving charge, the DWI.
>
> MR. PROCTOR: Okay. Do you remember with any specificity what he said? You can use your report, if necessary.
>
> OFFICER SUITT: Yeah, just -- I'll read it straight from - - from the report. . . . "Mr. Moore went on to advise me he ran from . . . officers on 5/21/15 [] because he had been

> drinking and did not want to deal with the driving while impaired charge."
>
> MR. PROCTOR: Okay. And was that statement made in response to any questions that you posed to him?
>
> OFFICER SUITT: No, I did not ask any questions. And the reason I did not ask him any questions, I had not Mirandized him any -- in any way because I had no intentions on asking any questions.

Based upon this testimony, the trial court found that defendant's statements were "spontaneous utterances" that were "not made in response to questions posed to him by law enforcement" and that "defendant's statement in response to a radio communication by a law enforcement officer *to Suitt* cannot be interpreted to be an interrogation or questioning of defendant." (emphasis in original). The court concluded that "[d]efendant's statements were not coerced, and were not obtained in violation of his constitutional rights."

The thrust of defendant's appellate argument is that Officer Suitt should have known that the conversation between Officer Suitt and another officer would be reasonably likely to elicit an incriminating response. Defendant asserts that defendant had a reasonable "perception that he was expected to participate in the conversation" initiated over the police radio by Officer Suitt's superior officer. Defendant also notes that before Officer Suitt turned off the video recording in the patrol car, he asked defendant where he had been walking. There is no indication in the record that defendant answered this question. Moreover, defendant's inculpatory statements did not pertain to his walk on the morning of his arrest.

Defendant has not directed our attention to appellate jurisprudence in which the court held that a brief exchange between two law enforcement officers was the functional equivalent of interrogation, and we note that in the leading case on this issue, *Rhode Island v. Innis*, 446 U.S. 291, 64 L. Ed. 2d 297 (1980), the Supreme Court rejected a similar argument. In *Innis*, the defendant was arrested for a homicide. During the drive to the law enforcement center, the officers who had arrested defendant discussed the fact that the firearm used in the murder had not been located, and expressed concern about the possibility that a handicapped child might find the weapon and harm himself. Defendant interrupted the officers' conversation and offered to show them where the gun was located. On appeal, the defendant argued that the officers' discussion was the equivalent of an interrogation. The Supreme Court

first enunciated the standard for determining when a defendant is subjected to interrogation:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

*Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 307-08. The Court then applied this standard to the facts of *Innis*, and held that the conversation conducted by the officers in the defendant's presence did not constitute the equivalent of an interrogation:

> [W]e conclude that the respondent was not "interrogated" within the meaning of *Miranda*. . . . [T]he conversation between [the officers] included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited. Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that [the officers] should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent.

*Innis* at 302, 64 L. Ed. 2d at 309. We find *Innis* to be functionally indistinguishable from the present case. Indeed, the officers' conversation in *Innis* was more likely to elicit a response from the defendant, given the emotional tone of the officers' concern for the safety of a child, than would the question asked over the police radio in the presence of this defendant in the present case.

We have also considered the holding of our Supreme Court in *State v. DeCastro*, 342 N.C. 667, 466 S.E.2d 653 (1996). In *DeCastro*, the defendant was arrested on charges of robbery and murder and was taken to

the law enforcement center, where an officer took possession of the defendant's clothing and personal effects. This officer asked another law enforcement officer who was present whether defendant could retain custody of money that was in his possession. Defendant overheard and volunteered that he "had some of my own money, too" a statement that supported the charge of robbery. *DeCastro*, 342 N.C. at 678, 466 S.E.2d at 658. On appeal, defendant argued that "the detective's question, made in defendant's presence while he was in police custody, could have been perceived by defendant as seeking a response" and was therefore "the functional equivalent of police interrogation in violation of his constitutional rights." *DeCastro* at 683, 466 S.E.2d at 661. Our Supreme Court rejected this argument, holding that defendant's statement "was not the result of interrogation in derogation of defendant's right to have an attorney present during questioning. The question by Detective Berube regarding whether defendant could keep the money from his pocket was not directed to defendant, but to Agent McDougall." *DeCastro* at 684, 446 S.E.2d at 661. We conclude that defendant has failed to show that he was subjected to the functional equivalent of an interrogation, and that the trial court did not err by denying his motion to suppress.

## V. Conclusion

For the reasons discussed above, we conclude that the trial court did not err by denying defendant's motion to continue or his motion to suppress the statements he made to Officer Suitt, but that the trial court erred by admitting into evidence the cell phone copy of a surveillance video from the convenience store. We hold, however, that given the strength of the other evidence offered by the State, this error was not prejudicial to defendant.

NO ERROR IN PART, NO PREJUDICIAL ERROR IN PART.

Judges BRYANT and INMAN concur.

STATE OF NORTH CAROLINA
v.
ALFRED FRANKLIN WORLEY

No. COA16-941

Filed 18 July 2017

**Search and Seizure—warrants to search rental cabin and truck—stolen goods—totality of circumstances—nexus of locations—probable cause**

The trial court did not commit plain error in a case involving multiple counts of felony breaking and entering, larceny, and possession of stolen goods by denying defendant's motion to suppress evidence seized during the executions of warrants to search his rental cabin and truck for stolen goods where defendant contended there was an insufficient nexus between his rental cabin and the criminal activity at a horse trailer. The totality of circumstances revealed that despite no evidence directly linking the two places, the warrant affidavit established a sufficient nexus based on defendant's prior criminal record and familiarity of the property as a former employee. Thus, the magistrate was provided with a substantial basis to conclude that probable cause existed.

Appeal by defendant from order entered 21 April 2016 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 5 April 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Phillip Reynolds, for the State.*

*Stephen G. Driggers for defendant-appellant.*

ELMORE, Judge.

Alfred Franklin Worley (defendant) was convicted by a jury of multiple counts of felony breaking and entering, larceny, and possession of stolen goods. He appeals from an order denying his motion to suppress evidence seized during the executions of warrants to search his rental cabin and truck for stolen goods.

Four days after a reported breaking and entering of a horse trailer and larceny of six identified items of horse tack, a deputy applied for and was issued warrants to search defendant's rental cabin and his truck for

the horse tack. The search of the rental cabin yielded the stolen horse tack and other incriminating evidence justifying a second search of the cabin. Defendant was later arrested.

Defendant moved to suppress the evidence seized during the searches of his cabin, arguing the warrants lacked probable cause because the deputy's affidavit underlying both search warrants established no nexus between defendant's rental cabin and the reported breaking and entering and larceny. The trial court concluded the affidavit established probable cause and entered an order denying defendant's suppression motion.

On appeal, defendant argues again the warrants to search his cabin for the missing horse tack lacked probable cause because the underlying affidavit failed to establish a nexus between the criminal activity and his rental cabin. Because we hold that under the totality of the circumstances, the accumulation of reasonable inferences drawn from information contained within the affidavit sufficiently linked the criminal activity to defendant's cabin, and thus demonstrated the magistrate had a substantial basis to conclude that probable cause existed to issue the warrants, we affirm the trial court's order.

## *I. Background*

On 28 December 2014, Deputy Matthew C. Owen of the Transylvania County Sheriff's Office (TCSO) applied for warrants to search defendant's truck and rental cabin for identified items of horse tack reported missing after a breaking and entering of a horse trailer on 441 Sugar Loaf Road. Deputy Owen's supporting affidavit revealed the following information.

On 25 December 2014, deputies of the TCSO responded to a reported breaking and entering of a horse trailer located at 441 Sugar Loaf Road and discovered that horse tack worth approximately $1,135.00 was missing and last seen the previous morning. On 27 December 2014, Mrs. McCall, one of the property's owners, called the TCSO about the incident and reported that defendant was a likely suspect of the breaking and entering and larceny. She told Deputy Owen that defendant moved to Florida about one year ago, but she recently discovered he was back in town, and heard someone had seen defendant on Sugar Loaf Road. She reported that defendant was currently renting a cabin at a nearby resort, The Adventure Village and Lodgings (Adventure Village). She further stated that defendant had worked for the McCalls around their farm about one year ago and that, during that time, several tools and equipment went missing from their farm. Although the McCalls suspected defendant stole

these items, they were never able to prove it. Mrs. McCall also stated that immediately before defendant moved to Florida, someone had broken into her daughter's car and stolen approximately $1,050.00.

On 28 December 2014, Mr. McCall called the TCSO and reported to Deputy Owen that his son, Zach, had just observed defendant driving in a "very slow manner" down Sugar Loaf Road near the horse trailer. Mr. McCall stated that Zach drove toward defendant in an attempt to make contact with him, but defendant sped away and then turned into an apartment complex. Zach followed and when he turned into the complex, defendant sped away again, driving in a "very unsafe manner and at high speeds" through residential areas. Zach started to follow defendant again but stopped when the speed of pursuit became dangerous. Mr. McCall reported that Zach described defendant's truck as a grey GMC with an extended cab and temporary plates, and that they found the truck sitting "out of view" beside an office building at Adventure Village. Mr. McCall stated further that when defendant had worked on their farm, several items went missing, and that the larcenies stopped when defendant moved to Florida. Mr. McCall also reported that part of his fence had been knocked over when the horse trailer was broken into and entered, and that he observed a "fresh dent" on the grey GMC truck he believed belonged to defendant.

Deputy Owen subsequently confirmed with management at Adventure Village that defendant was currently renting Cabin #1 and was listed as the sole occupant on the lease. He discovered that defendant asked for a refund for his rental on 24 December 2014 so he could return to Florida. Deputy Owen also discovered a 1999 GMC Sierra Extended Cab Pickup Truck displaying temporary tags, registered to defendant, and parked "in an effort to be hidden behind the main office out of view behind a back hoe" at Adventure Village. When Deputy Owen examined the truck, he noticed a large and apparently recent dent on its driver's side, and he observed bullets on the driver's seat and floorboard. Deputy Owen checked defendant's criminal history and discovered that he had previously been convicted of first-degree burglary and felony larceny.

Additionally, in his affidavit, Deputy Owen recited his training and experience investigating approximately 100 breaking-and-entering cases and testified that, based on his experience, criminals who commit breaking-and-entering and burglary crimes "will often return to an area if there is more property which can be taken or to scope out other properties to burglarize." Deputy Owen stated further that, in his opinion, defendant's "actions today would lead a normal person to believe that he is involved . . . [by] running from the property owners and hiding his

vehicle from [the] site after doing so." He stated further that as a convicted felon, it was unlawful for defendant to possess firearms.

Supported by his affidavit, Deputy Owen applied for warrants to search Cabin #1 and the grey GMC truck for six identified items of horse tack and other fruits of the crimes, which the magistrate issued. During the execution of the first warrant at Cabin #1, Deputy Owen found and seized the horse tack sought, and other items of horse tack. He also observed and photographed other goods he suspected were stolen, including two trolling motors, several pairs of shoes, and a television. Supported by his first affidavit and these photographs, Deputy Owen applied for a second warrant to search Cabin #1, which the magistrate issued. Deputy Owen then executed the second search warrant and seized these additional items, which were later discovered to have been stolen from a barn adjacent to 441 Sugar Loaf Road and a residence located at 553 Sugar Loaf Road.

Defendant was arrested and indicted for several property-related offenses at the horse trailer and other nearby locations. After a two-day jury trial, defendant was convicted of multiple felonies arising from the stolen goods seized during the two searches at Cabin #1: larceny and possession of stolen goods with respect to the horse tack taken from the horse trailer at 441 Sugar Loaf Road; breaking and entering, larceny after breaking and entering, and possession of stolen goods with respect to the trolling motors taken from the barn adjacent to 441 Sugar Loaf Road; breaking and entering, larceny after breaking and entering, and possession of stolen goods with respect to the shoes and television taken from the residence at 553 Sugar Loaf Road; habitual breaking and entering; and possession of a firearm by a felon. The trial court consolidated the offenses into four judgments and sentenced defendant to fifty-six to ninety-eight months of incarceration.

Prior to trial, defendant filed a motion to suppress the evidence seized from the searches at Cabin #1, arguing the warrants lacked probable cause because Deputy Owen's affidavit established no "nexus between the alleged crimes and the location to be searched." At the suppression hearing, the trial court reviewed Deputy Owen's affidavit, concluded it established probable cause to issue the search warrants, and then entered an order denying defendant's suppression motion. Defendant appeals this suppression order.

## *II. Analysis*

Defendant contends the trial court committed plain error by denying his motion to suppress evidence seized from his rental cabin because

the search warrants lacked probable cause. He argues the affidavit supporting both warrants to search his rental cabin lacked a sufficient nexus between Cabin #1 and the reported breaking and entering and larceny at the horse trailer on 441 Sugar Loaf Road. We disagree.

**A. Standard of Review**

As defendant concedes, although he moved to suppress this evidence before trial, because he failed to object to its admission at trial, he failed to preserve this error and is thus entitled only to plain error review of the suppression order. *See State v. Larkin*, 237 N.C. App. 335, 339, 764 S.E.2d 681, 685 (2014), *disc. rev. denied*, 368 N.C. 245, 768 S.E.2d 841 (2015). To establish plain error, a defendant "must first demonstrate that the trial court committed error, and next 'that absent the error, the jury probably would have reached a different result.' " *Id.* (quoting *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988 (2003)).

We review an order denying a motion to suppress to determine "whether the trial court's 'underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law.' " *State v. Allman*, ___ N.C. ___, ___, 794 S.E.2d 301, 304 (2016) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). We review *de novo* a trial court's conclusion that a magistrate had probable cause to issue a search warrant. *See id.* at ___, 794 S.E.2d at 305.

In determining whether probable cause exists to issue a search warrant, "[a] magistrate 'must make a practical, common-sense decision' based on the totality of the circumstances, whether there is a 'fair probability' that [evidence] will be found in the place to be searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

Reviewing courts accord " 'great deference' " to an issuing magistrate's probable-cause determination. *Allman*, ___ N.C. at ___, 794 S.E.2d at 303 (quoting *Gates*, 462 U.S. at 236). Our role " 'is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.' " *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (quoting *Gates*, 462 U.S. at 238). We use a "totality of the circumstances test to determine whether probable cause exist[ed]." *Allman*, ___ N.C. at ___, 794 S.E.2d at 303 (citing *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260–61).

**B. Discussion**

Defendant contends the warrants to search his rental cabin lacked probable cause because the supporting affidavit was "based on the suspicions of [Mr.] and [Mrs.] McCall but not on a nexus between the breaking and entering of the horse trailer at 441 Sugar Loaf Road and [defendant's] cabin." We disagree.

We review the sufficiency of a search warrant affidavit to ensure the facts and circumstances described and all reasonable inferences drawn therefrom supplied a magistrate " 'reasonable cause to believe that the search will reveal the presence of the [items] sought on the premises described in the [warrant] application,' and that those items 'will aid in the apprehension or conviction of the offender.' " *Allman*, ___ N.C. at ___, 794 S.E.2d at 303 (quoting *State v. Bright*, 301 N.C. 243, 249, 271 S.E.2d 368, 372 (1980)).

A supporting affidavit " 'must establish a nexus between the [evidence] sought and the place to be searched.' " *State v. Parson*, ___ N.C. App. ___, ___, 791 S.E.2d 528, 536 (2016) (quoting *State v. Oates*, 224 N.C. App. 634, 644, 736 S.E.2d 228, 235 (2012), *disc. rev. denied*, *appeal dismissed*, 366 N.C. 585, 740 S.E.2d 473 (2013)). Ideally, this nexus is established by direct evidence "showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place." *Id.* (quoting *Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235). Yet absent evidence directly linking criminal activity to a particular place, this nexus may be inferred by the accumulation of reasonable inferences drawn from information contained within an affidavit. *See Allman*, ___ N.C. at ___, 794 S.E.2d at 305–06 (affirming probable-cause determination despite warrant affidavit not "directly link[ing] defendant's home with evidence of drug dealing" because nexus could be reasonably inferred from factual allegations and accumulated circumstantial evidence); *see also State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) ("[A] magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." (citing *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991)).

As an initial matter, defendant correctly notes the affidavit contained no direct evidence that anyone had observed him break into the horse trailer, steal the horse tack, bring it to his cabin, or store the horse tack there. In the context of search warrants, " 'probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.' " *State v. Benters*, 367 N.C. 660, 664–65, 766

S.E.2d 593, 598 (2014) (quoting *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433). Here, Deputy Owen's affidavit established there was a reported breaking and entering and larceny and allegations about defendant that permitted the magistrate to conclude there was probable cause to believe that defendant was the offender under the circumstances.

The affidavit established that when the McCalls employed defendant to work around their farm, several tools and pieces of equipment went missing and were never recovered; that immediately before defendant moved to Florida, someone broke into the McCall's daughter's car and stole approximately $1,050.00; that defendant rented a cabin located within close proximity to the McCall's property around the same time as the reported breaking and entering and larceny; and that defendant had prior felony convictions for first-degree burglary and felony larceny. It was thus reasonable for the magistrate to infer that someone with such a criminal history that was familiar with the McCall's property and may have successfully stolen from them in the past, might return and attempt to steal from the McCall's property again.

Based on Mr. McCall's statements that when Zach saw defendant driving down Sugar Loaf Road and attempted to contact him, defendant sped quickly away and then turned into an apartment complex; that when Zach followed defendant into the complex, he again sped quickly away and Zach attempted to but was unable to follow defendant safely; and that the McCalls and Deputy Owen observed defendant's truck parked deliberately outside of plain view at Adventure Village, it was reasonable to infer that defendant might have attempted to evade Zach after stealing from the McCalls and to hide his truck after Zach saw him. Based on Mr. McCall's statement that a section of his fence had been knocked over when the breaking and entering occurred, and that Mr. McCall and Deputy Owen observed an apparently fresh dent on defendant's truck, it was reasonable to infer that defendant's truck knocked down the fencing during the commission of the crimes.

Based on Deputy Owen's statement that defendant sought a refund for his cabin on the same day of the reported incident, it was reasonable to infer that defendant may have been attempting to immediately leave town and return home with the fruits of his larceny. And based on Mrs. McCall's statements that someone told her defendant was seen on Sugar Loaf Road immediately before the incident; Mr. McCall's statements that Zach saw defendant driving slowly down Sugar Loaf Road three days after the incident; and that, based on Deputy Owen's extensive experience investigating breaking-and-entering cases, criminals often return to the area if there is more property to be taken or to

scope out other properties to burglarize, it was reasonable to infer further that defendant might have scoped out the McCalls property before the crimes and then returned to consider whether there was any more property he could steal. Under the totality of circumstances, we conclude the affidavit established a sufficient "probability or substantial chance" that defendant participated in the reported breaking and entering of the horse trailer and larceny of the horse tack.

Accordingly, having determined the affidavit established probable cause to believe defendant participated in the crimes, we must now determine whether it supplied the magistrate " 'reasonable cause to believe' " a search of defendant's cabin would yield the stolen horse tack, which would certainly " 'aid in the apprehension or conviction of the offender.' " *See Allman*, ___ N.C. at ___, 794 S.E.2d at 303 (quoting *Bright*, 301 N.C. at 249, 271 S.E.2d at 372).

Here, the crime being investigated was a confirmed breaking and entering and larceny reported to have occurred only four days earlier, and the items sought included detailed descriptions of missing horse tack, including two saddle pads, two saddles, and two bridles with bits. Although the affidavit never explicitly stated that defendant's rental cabin or his truck were the likely repository for the horse tack, it established that defendant permanently resided in Florida and was the sole occupant of a nearby cabin rented around the same time as the incident, and that a GMC truck parked outside Adventure Village was registered to defendant. The affidavit never explained the geographic relationship between the horse trailer and defendant's cabin, but it did explain their locations, permitting the magistrate to draw a reasonable inference from the close proximity of the larceny to defendant's cabin. Further, the affidavit did not allege that defendant kept any permanent residence, office, or storage facility in North Carolina, providing a reasonable inference that defendant's cabin or truck were the only two possible storage places for the stolen goods sought.

Because Deputy Owen alleged in his affidavit that he examined defendant's truck and observed in plain view bullets lying on the driver's seat, it was reasonable for the magistrate to infer that Deputy Owen did not observe any stolen horse tack when he peered through the truck's windows, and that he looked in the truck bed. It was reasonable to infer further that since certain larger items like the two saddles were unobserved, and could not reasonably be expected to be stored in any concealed compartment in the truck or on defendant's person, these items were likely to be stored in his rental cabin. *See State v. Whitley*, 58 N.C. App. 539, 544, 293 S.E.2d 838, 841 (1982) ("Since at least some of the

items the informant alleged defendant possessed are not such as could reasonably be expected to be stored on defendant's person, . . . the inference that the stolen goods were possessed at defendant's residence reasonably arises . . . .").

Based on the allegations and circumstances contained within the affidavit, it was reasonable for the magistrate to infer cumulatively that defendant, an out-of-state resident suspected of a reported breaking and entering and larceny from four days earlier, might keep the fruits of the larceny at his nearby rental cabin. "These are just the sort of commonsense inferences that a magistrate is permitted to make when determining whether probable cause exists." *Allman*, ___ N.C. at ___, 794 S.E.2d at 305. Accordingly, we conclude the affidavit established a sufficient nexus between the criminal activity and defendant's rental cabin, and thus provided the magistrate probable cause to issue the warrants to search Cabin #1 for the missing horse tack.

### *III. Conclusion*

Under the totality of the circumstances, despite evidence not directly linking the criminal activity to the place to be searched, the warrant affidavit established through the accumulation of reasonable inferences a sufficient nexus between defendant's rental cabin and the reported criminal activity, and thus provided the magistrate a substantial basis to conclude that probable cause existed to search defendant's cabin for the missing horse tack. Therefore, we hold that the trial court properly denied defendant's motion to suppress and affirm its order.

AFFIRMED.

Judges INMAN and BERGER concur.

STATE OF NORTH CAROLINA
v.
JENNIFER LEIGH YOUNTS, DEFENDANT

No. COA16-213

Filed 18 July 2017

**1. Evidence—expert testimony—driving while impaired—Horizontal Gaze Nystagmus test**

The trial court did not err in a driving while impaired case by admitting expert testimony from an officer regarding the results of a Horizontal Gaze Nystagmus ("HGN") test where he was not required to first determine that HGN testing was a product of reliable principles and methods under N.C.G.S. § 8C-1, Rule 70 before testifying about it.

**2. Motor Vehicles—driving while impaired—speculation on breathalyzer test result—appreciable impairment**

The trial court did not err in a driving while impaired case by not intervening ex mero motu when the prosecutor speculated in the State's closing argument about what defendant's breathalyzer test result would have been an hour before she was actually tested where there was ample evidence that defendant was guilty based upon a theory of appreciable impairment independent of her blood alcohol concentration.

Appeal by Defendant from judgment entered 24 September 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 22 August 2016.

*Attorney General Joshua H. Stein, by Assistant Attorney General Ashleigh P. Dunston, for the State.*

*Joseph P. Lattimore for Defendant-Appellant.*

INMAN, Judge.

Under Rule 702 of the North Carolina Rules of Evidence, a trial court does not err when it admits expert testimony regarding the results of a Horizontal Gaze Nystagmus ("HGN") test without first determining that HGN testing is a product of reliable principles and methods as required by subsection (a)(2).

Jennifer Leigh Younts ("Defendant") appeals from a judgement entered following a jury trial in which she was found guilty of driving while impaired. Defendant argues that the trial court erred by admitting testimony about the results of an HGN test, because the testifying officer did not lay the evidentiary foundation required for expert testimony. Defendant also argues that the trial court erred by not intervening *ex mero motu* when the prosecutor, in closing argument, speculated as to what Defendant's blood alcohol concentration would have been an hour before she was tested. After careful consideration, we hold: (1) that the trial court did not err by admitting HGN evidence without first making a determination as to its reliability and (2) that the trial court did not err in failing to intervene in the prosecutor's closing argument.

**Factual and Procedural History**

The State's evidence at trial tended to show the following:

On 21 October 2014 at around 6:20 p.m., Myron R. Coffey, of the North Carolina Highway Patrol ("Trooper Coffey") clocked Defendant traveling in a black car at seventy-six miles per hour in a fifty-five mile per hour zone on Interstate Highway 240 near Asheville. Trooper Coffey activated his blue lights and pulled behind Defendant's vehicle. Defendant pulled off to the side of the road onto an exit ramp approximately four-tenths of a mile down the highway.

As Trooper Coffey approached Defendant's vehicle, he noticed "a strong odor of alcohol coming out of the vehicle." Trooper Coffey also noticed Defendant had "red glassy eyes and slurred speech." He asked Defendant if she had had anything to drink that day; she responded affirmatively. Trooper Coffey then asked Defendant to step out of her vehicle to undergo several standardized field sobriety tests.

The first test Trooper Coffey administered was an HGN test. Based on Defendant's results from the HGN test, Trooper Coffey did not "feel like [Defendant's] impairment was anything other than alcohol[,]" and did not administer a Vertical Gaze Nystagmus test. Next, Trooper Coffey had Defendant perform the "walk and turn test." Trooper Coffey noted that Defendant could not keep her balance, could not walk a straight line, missed the heel to toe steps, used her arms incorrectly, did not take the proper number of steps, and could not keep her foot planted on the turn. Defendant then performed the "one-leg stand" test. She was unable to balance on one foot, switched feet mid-test, and almost fell over. Trooper Coffey was "looking for a total of four clues, and [Defendant] showed all four clues on [the one-leg stand] test."

Trooper Coffey administered one final test, a portable breath test, which was positive for the presence of alcohol. Trooper Coffey sought to repeat the portable breath test to ensure accuracy, but Defendant refused to cooperate. Trooper Coffey concluded that Defendant was impaired and placed her under arrest. At the Buncombe County Detention Facility, at approximately 6:42 p.m., Defendant consented to take the Intoxilyzer breath test. Defendant invoked her right to have a witness present; however, no witness appeared within thirty minutes, and Trooper Coffey administered the Intoxilyzer breath test at 7:18 p.m. The results of this breath test indicated a blood alcohol concentration of .06.

Following the Intoxilyzer test, Defendant was charged with driving while impaired. Following a trial in Buncombe County District Court on 18 August 2015, Defendant was convicted of driving while impaired and immediately filed a notice of appeal to superior court.

Pending trial *de novo* in superior court, Defendant filed a motion *in limine* to exclude, *inter alia*, expert testimony regarding the results of the HGN test. Defendant requested a *voir dire* hearing of Trooper Coffey to determine the admissibility of his HGN testimony. Following the impaneling of the jury but outside the jury's presence, the trial court allowed the *voir dire* of Trooper Coffey.

In the *voir dire* hearing, Trooper Coffey testified about his qualifications to administer the standardized field sobriety tests, including the HGN test. He stated he received 40 hours of training, and continued refresher courses every two years. Trooper Coffey explained the HGN test, how it is administered, and what he looks for throughout the test. He admitted he had not independently researched HGN testing and that he did not know the rate of error. He acknowledged that causes other than alcohol impairment can affect the results of an HGN test. The trial court initially allowed Defendant's motion to exclude Trooper Coffey's testimony about the HGN test results because the State had not presented testimony "regarding his administration of the test or how these methods were applied[.]"

The State requested a reexamination of Trooper Coffey in the *voir dire* hearing to lay the proper foundation. Following the additional testimony, the trial court denied Defendant's motion to exclude the HGN evidence, finding:

> [B]ased upon this trooper's observations, his proper training, experience, and education, skill, knowledge, and the fact that he was properly qualified, he has been certified

> in administering the horizontal gaze nystagmus test; and he administered—he has testified as to how he administered the test, and he administered the test according to his training in this particular instance and recorded those test results accurately and has testified to all of these . . . pursuant to 702(a) that this scientific, technical, or specialized knowledge will assist the trier of fact in understanding the evidence or determine the facts in issue in this case, the issue of impairment, exclusively the issue of impairment; and the witness is qualified as an expert by knowledge, skill, experience, training, or education and may testify thereto in the form of an opinion and being qualified under 702(a) of this chapter and the proper foundation having been laid as indicated by the Court.

Before the jury, in addition to testifying about his experience and training in administering HGN tests, Trooper Coffey testified about his qualifications and experience in administering other field sobriety tests, as well as the events surrounding Defendant's arrest.

The trial court instructed the jury that Defendant could be found guilty of impaired driving based either upon having an appreciable impairment or having a blood alcohol concentration equal to or greater than a statutory measure:

> The Defendant is under the influence of an impairing substance when the Defendant has taken or consumed a sufficient quantity of that impairing substance to cause the Defendant to lose the normal control of the Defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties or the Defendant had consumed sufficient alcohol that at any relevant time after the driving, the Defendant had an alcohol concentration of .08 or more grams of alcohol per 210 liters of breath.

The jury returned a verdict finding Defendant guilty of driving while impaired. The trial court sentenced Defendant as a Level V offender to sixty days of imprisonment to be suspended conditioned upon the successful completion of twelve months of supervised probation, twenty-four hours of community service, alcohol abstinence while on probation, and payment of fines and costs. Defendant gave oral notice of appeal in open court.

## Analysis

### I. HGN Testing

**[1]** Defendant argues that the trial court misinterpreted Rule 702(a) of the North Carolina Rules of Evidence, its subsequent amendments, and the recent case precedent in denying Defendant's motion to exclude Trooper Coffey's testimony about the HGN test results. Specifically, Defendant asserts that the trial court failed to require Trooper Coffey to establish the reliability of the HGN test prior to admitting the testimony. We disagree.

*A. Standard of Review*

Because Defendant raises this issue within the framework of statutory construction, we review the issue *de novo*. *Cornett v. Watauga Surgical Group, P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008) ("Where the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*.") (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

*B. Rule 702 Requirements*

At the heart of this case is whether the recently amended Rule 702(a)[1] requires the State to lay a proper foundation regarding the reliability of an HGN test before an officer or other qualified expert is allowed to testify about the results of the particular test; we hold it does not.

The North Carolina Supreme Court first addressed the admissibility of HGN evidence in *State v. Helms*, and held that HGN testing "represents specialized knowledge that must be presented to the jury by a qualified expert." 348 N.C. 578, 581, 504 S.E.2d 293, 295 (1998). At the time, the North Carolina Rules of Evidence—Rule 702—dictated that "new scientific methods of proof [were] admissible at trial if the method [was] sufficiently reliable." *Id.* (quoting *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990)) (internal quotation marks omitted). In reference to this standard, the Supreme Court stated that "[i]n general, when no specific precedent exists, scientifically accepted reliability justifies

1. Rule 702(a) was amended effective 1 October 2011. Because Defendant was charged with an offense occurring on 21 October 2014, the amended Rule applies to this case.

admission of the testimony of qualified witnesses, and such reliability may be found either by judicial notice or from the testimony of scientists who are expert in the subject matter, or by a combination of the two." *State v. Bullard*, 312 N.C. 129, 148, 322 S.E.2d 370, 381 (1984) (citation omitted). Ultimately, the Court in *Helms* held that the trial court erred in admitting an officer's testimony regarding the results of an HGN test because there was no indication in the record of evidence admitted, or inquiry conducted, regarding the reliability of HGN testing. *Helms*, 348 N.C. at 582, 504 S.E.2d at 295.

Since *Helms*, Rule 702 has undergone several amendments relevant to our analysis today. In 2006, the General Assembly added subsection (a1) to Rule 702. 2006 N.C. Sess. Laws ch. 253, § 6. Rule 702(a1) provides in pertinent part:

> (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> > (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

N.C. Gen. Stat. § 8C-1, Rule 702(a1) (2007). At the time the amendment took effect, subsection (a) provided:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2007). Based on this standard for qualifying an expert, our Court interpreted the Rule 702(a1) amendment to have the effect of "obviating the need for the State to prove that the HGN testing method is sufficiently reliable." *State v. Smart*, 195 N.C. App. 752, 756, 674 S.E.2d 684, 686 (2009).

In 2011, however, the General Assembly altered the requirements of Rule 702(a) for the qualification of an expert as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

> by knowledge, skill, experience, training, or education, may testify thereto in the form of an ~~opinion.~~ *opinion, or otherwise, if all of the following apply:*
>
> *(1) The testimony is based upon sufficient facts or data.*
>
> *(2) The testimony is the product of reliable principles and methods.*
>
> *(3) The witness has applied the principles and methods reliably to the facts of the case.*

2011 N.C. Sess. Laws ch. 283, § 1.3 (emphasis added). In *State v. McGrady*, 368 N.C. 880, 884, 787 S.E.2d 1, 5 (2016), the Supreme Court confirmed that this most recent amendment of Rule 702 adopted the federal standard for expert witness testimony articulated in the *Daubert* line of cases.[2] "These three prongs [under Rule 702(a)] together constitute the reliability inquiry discussed in *Daubert*, *Joiner*, and *Kumho*. The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (internal quotation marks and citations omitted). "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each

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2. The North Carolina Supreme Court recognized in *McGrady* that *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993), and its progeny

> [a]rticulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593-94, [125 L.E.2d at 482-83]. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho* [*Tire Co., Ltd. v. Carmichael*], 526 U.S. [137,] 147-49, [143 L.Ed.2d 238, 249-51 (1999)]. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." *Id.* at 152, [143 L.Ed.2d at 252]. Those factors are part of a "flexible" inquiry, *Daubert*, 509 U.S. at 594, [143 L.Ed.2d at 483-84], so they do not form "a definitive checklist or test," *id.* at 593, [143 L.Ed.2d at 482]. And the trial court is free to consider other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150, [143 L.Ed.2d 251-52].

*McGrady*, 368 N.C. at 890-91, 787 S.E.2d at 9-10.

case the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.* (citation omitted).

The issue before us is whether *Smart*'s conclusion that Rule 702(a1) obviated the need to prove HGN testing's reliability is still good law following our State's adoption of the federal reliability test under *Daubert*. This issue has been recognized in previous cases, but has not been squarely resolved. *State v. Godwin*, __ N.C. App. __, __, 786 S.E.2d 34, 38 (2016), *aff'd in part and rev'd in part by*, __ N.C. __, __ S.E.2d __ (2017) ("While some may even question whether Smart survives the amendment to Rule 702(a), that issue is not the one presently before us.").

In its recent decision in *Godwin*, the Supreme Court construed subsections (a) and (a1) together and reasoned that the General Assembly sought to "allow testimony from an individual who has successfully completed training in HGN and meets the criteria set forth in Rule 702(a) . . . ." *Id.* at __, __ S.E.2d at __ (internal quotation marks and citations omitted). Although the trial court in *Godwin* made no finding on the record that the testifying officer qualified as an expert, the Supreme Court held that "the trial court implicitly found that [an officer] was qualified to give expert testimony [on the results of an HGN test,]" *id.* at __, __ S.E.2d at __, because the record contained "sufficient evidence upon which the trial court could have based an explicit finding that the witness was an expert," *id.* at __, __ S.E.2d at __. This evidence was in the form of the officer's testimony about his "knowledge, skill, experience, training, [and] education[,]" and the trial court's establishment that "[the officer's] testimony met the three-pronged test of reliability pursuant to the amended rule . . . ." *Id.* at __, __ S.E.2d at __. The Supreme Court further reasoned that

> [t]he trial court conducted its own voir dire of [the officer], which elicited testimony that the HGN test he administered to defendant on the day in question was given in accordance with the standards set by the [National Highway Traffic Safety Administration], and that those standards were derived from the results of a specific scientific study. Additionally, the trial court's voir dire confirmed that the principles and methods utilized in the HGN test were found to be reliable indicators of impairment, and that [the officer] applied those principles and methods to [the] defendant in this case.

*Id.* at __, __ S.E.2d at __. The Supreme Court relied on the above inquiry to distinguish *Godwin* from the Court's ruling in *Helms*:

> [A]lthough the officer in *Helms* testified that he had taken a forty hour training course in the use of the HGN test, the State presented no evidence regarding—and the court conducted no inquiry into—the reliability of the HGN test. We also noted in *Helms* that nothing in the record of the case indicated that the trial court took judicial notice of the reliability of the HGN test. . . . *This scenario plainly contrasts with the present case in which the trial court made a finding of reliability of the HGN test and an implicit finding that [the officer] was qualified as an expert.*

*Id.* at __, __ S.E.2d at __ (emphasis added).

Here, much like in *Helms*, defense counsel objected to the HGN evidence at trial because the State failed to present evidence of—and the trial court conducted no inquiry into—the reliability of the HGN test. The only testimony relating to the reliability of the HGN test was presented on cross-examination:

> DEFENSE COUNSEL: Are you published in HGN?
>
> OFFICER: What do you mean published?
>
> DEFENSE COUNSEL: Have you published any kind of research or studies or anything like that? Are you familiar with any?
>
> OFFICER: I haven't done any independent search.
>
> DEFENSE COUNSEL: Have you – are you familiar with any publications that have been subjected to peer review?
>
> OFFICER: No.
>
> DEFENSE COUNSEL: You mentioned – what causes HGN?
>
> OFFICER: There's certain types of nystagmus. But the type I'm looking for is horizontal gaze nystagmus. And basically the only thing that will cause that is the impairment of alcohol.
>
> . . .
>
> OFFICER: [Reading from the NHTSA training manual] Although this type of nystagmus is most accurate for determining alcohol impairment, its presence may also be – I'm sorry, its presence may also indicate use of certain other drugs.

DEFENSE COUNSEL: So alcohol is not the only thing that causes horizontal gaze nystagmus; correct?

OFFICER: Correct.

. . .

STATE's COUNSEL: And based on your observations of the Defendant, what is the significance of the six out of six clues?

OFFICER: There was a few studies done, I believe in the 1980's that stated that if you show six out of six clues, that your impairment of alcohol is above a .08. the percentage – actually, if you're showing four out of six, you're an 08. Six out of six clues, your concentration could be higher.

. . .

DEFENSE COUNSEL: What's the potential rate of error for HGN test?

OFFICER: Like I said, I'm not sure what the rate of error would be.

DEFENSE COUNSEL: Have you actually read like the studies you're talking about in the 80's?

OFFICER: When I received the training, they went over the studies, but I don't have the exact percentages. I don't have that written down.

DEFENSE COUNSEL: I know that they went over this. I've actually done it myself, the NITSA [sic] training, and they refer to the studies as well; but have you read them, yourself, or did you just do the NISTA [sic] training?

OFFICER: I have read them during the training.

DEFENSE COUNSEL: What are the names of the studies?

OFFICER: I'm sorry?

DEFENSE COUNSEL: What are the names of those studies?

OFFICER: I'm not sure.

This evidence standing alone is insufficient to establish, in accordance with the statutory criteria, the HGN test as a reliable indicator of impairment.

Furthermore, a close examination of the trial court's decision demonstrates that, while the trial court made determinations as to the whether the testimony was "based upon sufficient facts or data[,]" N.C. Gen. Stat. § 8C-1, Rule 702(a)(1), and whether Trooper Coffey "applied the principles and methods reliably to the facts of the case[,]" N.C. Gen. Stat. § 8C-1, Rule 702(a)(3), it did not take judicial notice of—or hear evidence on—the reliability of the HGN test. Rather, the record reflects that trial court did not consider whether Trooper Coffey's testimony met the second prong of the reliability test—*i.e.* whether the "testimony is the product of reliable principles and methods[,]" N.C. Gen. Stat. § 8C-1, Rule 702(a)(2).

Although defense counsel emphasized the lack of testimony regarding the reliability of the HGN test, the trial court initially allowed Defendant's motion to exclude the testimony for a different reason, noting that "I don't think there's been any testimony at this time regarding [Trooper Coffey's] administration of the test or how these methods were applied[.]" Following additional testimony discussing Trooper Coffey's application of the principles and methods to the administration of the HGN test conducted on Defendant and arguments of counsel, the trial court found that

> [Trooper Coffey] is qualified as an expert by knowledge, skill, experience, training, or education and may testify thereto in the form of an opinion and being qualified under 702(a) of this chapter and the proper foundation having been laid as indicated by the Court.

The additional testimony did not, however, address the reliability of the HGN test, and a strict reading of Rule 702, without more, would suggest that the trial court erred by allowing Trooper Coffey's testimony without taking judicial notice of—or conducting an inquiry into—the reliability of the HGN test. However, we reach a different decision on this issue in light of *Godwin*.

The Supreme Court ultimately concluded in *Godwin* that "with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State." *Godwin*, __ N.C. at __, __ S.E.2d at __. This holding is similar to this Court's holding in *Smart* that the 2006 amendment to Rule 702 "obviat[ed] the need for the State to prove that the HGN testing method is sufficiently reliable." *Smart*, 195 N.C. App. at 756, 674 S.E.2d at 686. Accordingly, it appears that the ruling of *Smart* has survived the General Assembly's 2011 amendment designating our State

a *Daubert* State. Because the *Godwin* decision applied the most recent amendments to Rule 702 and is consistent with previous decisions eliminating the need to prove HGN testimony "[a]s the product of reliable principles and methods[,]" N.C. Gen. Stat. § 8C-1, Rule 702(a)(2), we are compelled to hold that the trial court did not err by admitting Trooper Coffey's testimony without first making such a determination.

### II. Speculation in Closing Argument

**[2]** Defendant next argues that the trial court erred by not intervening *ex mero motu* when the prosecutor speculated in the State's closing argument about what Defendant's breathalyzer test result would have been an hour before she was actually tested. In light of ample evidence and argument by the State that Defendant was guilty based upon a theory of appreciable impairment, independent of her blood alcohol concentration, we disagree.

"The standard of review for alleged errors in closing arguments 'depends on whether there was a timely objection made or overruled, or whether no objection was made and defendant contends that the trial court should have intervened *ex mero motu*.' " *State v. Chappelle*, 193 N.C. App. 313, 325, 667 S.E.2d 327, 334 (2008) (quoting *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003)). "Where no objection was made, this Court reviews the remarks for gross impropriety." *Id.* at 325, 667 S.E.2d at 334 (citations omitted).

In determining whether there was a gross impropriety, the remarks must be such that "they rendered the trial and conviction fundamentally unfair." *State v. Allen*, 360 N.C. 297, 306-07, 626 S.E.2d 271, 280 (2006). "[T]his Court considers the context in which the remarks were made, as well as their brevity relative to the closing argument as a whole[.]" *State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008) (internal quotation marks and citations omitted).

In closing argument, the prosecutor stated: "The Defendant blew a .06 one hour after driving. Blew a .06. What was she an hour before that? If you had that giant instrument in the trunk of his car, what would it have been[] an hour before that?" Defendant contends this statement amounted to grossly improper speculation in violation of N.C. Gen. Stat. § 15A-1230(a). Our review of the record reveals that, when viewed in context, the prosecutor's statement does not constitute a "gross impropriety." The prosecutor urged the jury to disregard Defendant's blood alcohol concentration, and instead focus on Defendant's failure to successfully complete Trooper Coffey's standardized field sobriety tests. The prosecutor emphasized to jurors that they could find Defendant

guilty without regard to her blood alcohol concentration. Accordingly, we hold that the prosecutor's statements were not so grossly improper that the trial court erred by failing to intervene *ex mero motu*.

**Conclusion**

Under the newly amended Rule 702(a), a trial court need not inquire about the reliability of HGN evidence before admitting an officer or other qualified expert to testify about the results of a particular HGN test. Additionally, the trial court did not err by failing to intervene *ex mero motu* in the prosecutor's closing argument.

NO ERROR.

Judges BRYANT and STROUD concur.

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KRISTIE LEA WILLIAMS, Plaintiff
v.
JAMES MARION CHANEY, Defendant

No. COA16-834

Filed 18 July 2017

**Child Custody and Support—child custody modification—substantial change in circumstances—additional counseling**

The trial court erred in a child custody case by concluding there was a substantial change in circumstances justifying a modification of a custody order that limited the mother's visitation rights and required additional family counseling. Numerous prior counseling efforts over most of the years of the sixteen-year-old child's life failed by causing severe stress to the child. Additional reunification counseling would re-traumatize him.

Appeal by defendant from order entered 31 May 2016 by Judge Larry J. Wilson in District Court, Lincoln County. Heard in the Court of Appeals 6 February 2017.

*No brief filed on behalf of plaintiff-appellee.*

*James M. Chaney, Jr., pro se.*

STROUD, Judge.

Blake[1] is now almost 16 years old, and this custody battle has lasted most of his life. The primary issue on appeal is whether the trial court should have ordered continuation of reunification counseling efforts, where the trial court found that prior reunification efforts have caused him "intense psychological stress" and that more reunification counseling would "re-traumatize" the child. We remand for entry of an order denying any modification to the prior custody order since no other result is supported by the trial court's unchallenged findings of fact.

Defendant James Marion Chaney ("Father") appeals from the trial court's order modifying an earlier permanent child custody order entered 10 October 2013. On appeal, Father argues that the trial court erred by concluding there was a substantial change in circumstances justifying a modification of the custody order because the findings of fact do not support this conclusion. Because the trial court's ultimate modifications to the custody order are not supported by the court's findings, we vacate and remand to the trial court for entry of a new order.

## Facts

This appeal arises in a long and highly contentious custody battle with four prior appeals.[2] We will briefly summarize the background of this case and then primarily focus on the facts necessary to address the sole issue raised in the present appeal. Father and plaintiff Kristie Lea Williams ("Mother") were formerly married and are now divorced. They had one child during the course of the marriage, Blake, born in August 2001. Mother was given primary physical legal custody of Blake on 11 June 2002 in a Consent Order for Permanent Custody and Visitation, with Father having secondary physical custody.

The trial court entered an Order for Temporary Modification of Child Custody in January 2006 after Father filed a motion to modify, in which the court noted examples of Mother's inappropriate behavior in Blake's presence. The trial court concluded that a substantial change

1. We use a pseudonym to protect the identity of the minor child.

2. *Williams v. Chaney*, 212 N.C. App. 694, 718 S.E.2d 737, 2011 WL 2448950, 2011 N.C. App. LEXIS 1246 (2011) (unpublished); *Williams v. Chaney*, 213 N.C. App. 425, 714 S.E.2d 275, 2011 WL 2848846, 2011 N.C. App. LEXIS 1543 (2011) (unpublished); *Williams v. Chaney*, __ N.C. App. __, 782 S.E.2d 122, 2016 WL 409901, 2016 N.C. App. LEXIS 124 (2016) (unpublished); *Williams v. Chaney*, __ N.C. App. __, 792 S.E.2d 207 (2016).

of circumstances had occurred justifying modification of the custody order, granted Father temporary physical and legal custody of Blake, and appointed a parenting coordinator. On 3 December 2007, the trial court entered an order for permanent child custody which noted that the parties consented to Father having primary physical custody of Blake. Mother was granted secondary custody, and the order set forth a specific custodial schedule.

In 2009 and 2010, both parties filed several motions and the trial court entered several orders, culminating in another order modifying the custodial schedule entered on 18 August 2010; this order was affirmed in a prior appeal. *See Williams*, 213 N.C. App. 425, 714 S.E.2d 275, 2011 WL 2848846, 2011 N.C. App. LEXIS 1543.

The series of events leading up to this appeal actually started all the way back in January 2011, when the trial court entered the order which suspended Mother's visitation entirely after finding that she had been evasive about her address. Mother's visitation was suspended until she appeared before the trial court and presented satisfactory evidence of her living situation and her compliance with prior orders to obtain counseling. Specifically, Mother could seek to have her visitation rights reinstated if she provided satisfactory information to the trial court regarding her residence address, living conditions, persons who lived with her, and documentation that she was receiving psychological counseling as ordered in 2010. Mother did not see Blake at all from November 2010 until 2013 other than at one counseling session.

On 30 January 2013, after Mother requested a "Status Hearing," the trial court entered a permanent child custody order concluding that there had been a substantial change in circumstances since prior custody orders entered in 2010. This order was intended to assist in restoring Mother's relationship with Blake, since she had been absent from his life since 2010. The trial court found that

> visitation and modification of custody is in the best interests of the minor child in order for the child to establish and maintain a relationship with his mother however, the circumstances require a more limited visitation schedule in order to provide stability and predictability for the minor child in his primary home with his father.

The court granted Mother limited but gradually increasing visitation with Blake under a specific schedule that was laid out in the order and required counseling for Mother and Blake.

Mother filed a "Motion for Contempt, Motion to Review and Enforce Order, and Motion for Attorney's Fees" on 17 April 2013. In her motion, Mother argued that Father had "failed to adhere to the terms of the Court's Order" on numerous occasions and she asked for the trial court to hold Father in contempt. Mother also asked the trial court to review the visitation provisions in the 30 January 2013 order and "if necessary pronounce clarification, guidance and direction to the counselor as to the appropriate role of the counselor in the reunification process." On 23 April 2013, Father filed his own motion to modify custody, asserting that Mother had acted inappropriately in front of the minor child on multiple occasions. He asked that the trial court modify visitation in accordance with the recommendations of the child's counselor and that the court allow Blake to decide if he wanted to visit with Mother.

A series of at least five temporary and supplemental orders followed in response to the parties' competing motions for modification filed in April 2013. Aside from addressing various motions for contempt and other issues not directly relevant to this appeal, these orders generally addressed issues regarding the ongoing reunification counseling efforts and parenting coordinators. But on 10 October 2013, the trial court entered the order which this Court's prior opinion determined was the most recent permanent order subject to modification. Some of the findings of fact from this long and detailed order are instructive regarding the reunification efforts:

> 40. Although the court is disappointed Mr. Feasel [the child's counselor] refuses to work with the mother toward reunification, the court respects his professional opinion regarding the counseling provided for the child individually and the parties in the joint counseling sessions. The court understands his recommendations were made considering the child's mental health.
>
> 41. The mother was ordered to obtain counseling in paragraph 2R of the August 17, 2010 Order of the court. She was ordered again to comply with the order as a means to reinstate her visitation in the Order Suspending Visitation entered on December 17, 2010.
>
> 42. There have been two assigned parent coordinators throughout the history of this case. Judge Foster made findings about the most recent parent coordinators concerns in her order dated August 17, 2010. Findings #40 and #41 refer to the mother's need for "counseling or therapy.

This is necessary in order for the mother to gain a better perspective on handling her emotions."

43. Following the entry of Judge Foster's court order in January 2013, where the court relied on the opinion of Counselor Connie Zmijewski, the mother sought some individual counseling from the same therapist. Ms. Zmijewski was also qualified as an expert in family counseling. She testified she has counseled the mother about her visits with the child and regarding parenting issues. Ms. Zmijewski encouraged the mother to meet with reunification counselor. She counseled the mother approximately six times. This counseling was prior to [Blake's] reluctance to attend overnight visitation and prior to the mother's efforts to involve law enforcement to obtain physical custody of the child.

44. The parties have been regularly engaged in litigation since this case was transferred from Mecklenburg County. The current Lincoln County file consists of ten separate files and is approximately 14" thick. This court has observed the behavior of the Plaintiff/Mother since 2009 over the course of at least four contested hearings, of which three of those hearings lasted over three days.

45. The court is concerned that the mother has some type of personality disorder preventing her from participating in meaningful therapy to address her behavior and act in the best interest of the child. The court is concerned the mother does not have the capacity to accept any responsibility for the present quality of the relationship between herself and her son, as well as the capacity to acknowledge or respect her son's opinions and beliefs.

46. There has been a substantial change in circumstances from the entry of the prior order in that the child "exhibits emotions that mimic Post Traumatic Stress Disorder". (Defendant's Exhibit #2) The child has experienced panic attacks, nausea, fear and dread during the days prior to his scheduled visitation.

The court found that Mother had failed to comply with the terms of the court's prior orders and ordered that Mother complete a psychological evaluation. The trial court also suspended Mother's visitation privileges with Blake except that she was allowed to talk to him by telephone

twice a week on Monday and Thursday evenings and to attend one extracurricular activity a week of her choosing.

On 19 November 2013, after receiving the report from Mother's psychological evaluation, the trial court entered a supplemental order which noted that Mother was not diagnosed with any mental or personality disorders. The November 2013 order concluded that it would be in Blake's best interest for Mother and Father to participate in a "Child and Family Treatment Team" meeting with two therapists who have a relationship with the family. The trial court ordered that all parties participate in therapy for a minimum of four months and then the court would "review the progress of the therapeutic treatment upon notice of either party." The trial court entered an additional order in Febraury 2014 amending the 19 November 2013 supplemental order to substitute a counselor for the Child and Family Treatment Team meeting. On 10 September 2014, the trial court entered another order following a hearing in May 2014 regarding the appointment of a replacement counselor, allowing Mother to select a substitute counselor as her individual counselor.

In February 2015, Mother filed a notice of hearing to "review" the trial court's 19 November 2013 order as well as an order filed 10 September 2014 that was initially entered on 20 May 2014 "regarding restoration of the mother/child relationship[.]" After a hearing in March 2015, the trial court entered an order on 18 May 2015 suspending Mother's visitation with Blake except for the two telephone calls a week and one extracurricular activity a week. Mother appealed, and this Court vacated the May 2015 order because it did not include any findings of fact to support a permanent modification of custody or any conclusion that substantial changes in circumstances had occurred and remanded the matter to the trial court for entry of a new order. *See Williams*, __ N.C. App. __, 782 S.E.2d 122, 2016 WL 409901, 2016 N.C. App. LEXIS 124.

Following this Court's opinion, without hearing any additional evidence, the trial court entered a new order on 31 May 2016. The court made the following relevant findings:

> 10. Following the entry of the Permanent Order of January 30, 2013, the child began visiting his mother in January and February, 2013. He expressed his concern with some behaviors of his mother during the first few visits which were concerning to the Court. In March, 2013, as the visits were to progress to overnight, the minor child started complaining about stomach pain or nausea several days before the visits and he would not visit, or the

child just flat refused to go with [Mother], expressing fear. During this time Justin Feasel, the child's therapist, was meeting with the child to address these issues.

11. Mr. Feasel testified that mother contacted him via email on two occasions asking what he recommended for her to do to help improve her relationship with her son. Mr. Feasel recommended to the mother that she needed to go slow with the reunification process.

12. Rather than following Mr. Feasel's recommendations the mother continued to force the child to visit. The mother's actions continued to impede her relationship with the minor child.

13. Mr. Feasel testified and the Court finds persuasive that since March, 2013 the minor child has experienced fear, anxiety, shaking, an inability to sleep, nausea and anger regarding reunification with his mother.

14. On March 15, 2013, Mr. Feasel wrote a letter recommending that the child's visitation with his mother be limited to day visits.

15. Mr. Feasel had two joint sessions with [Blake] and his mother to address the child's concerns about visitation with his mother. During these sessions the minor child felt that his mother questioned and interrogated him. The child was expecting an apology from his mother; however, [Mother] provided explanations and these explanations were not how the child had perceived the events.

16. During these sessions with the child the mother showed an inability or an unwillingness to accept responsibility, and this inability or unwillingness is an impediment to her child forgiving her.

17. On April 17, 2013, [Mother] filed a motion for contempt alleging the father interfered with the visitation and stating the father should ensure the child exercise the court ordered visitation. The father filed his motion to modify custody on April 23, 2013, requesting relief from the visitation Order based on the counselor's recommendations included in the March 15, 2013 letter.

18. It was during this time the parties exchanged emails about visitation. The father took the child for the exchange; however the child refused to get into his mother's car.

19. On June 23, 2013 the Mother contacted the Lincoln County Sheriff Department to request assistance to enforce the visitation included in the Order. This incident upset the child to the point he was left shaking, crying, and afraid he would be taken from his father.

20. On July 28, 2013, the mother contacted [the] Mecklenburg County Sheriff Department for assistance at the exchange. This incident traumatized the minor child.

21. This Court has previously found that the mother's demeanor and her statements have left her unable or unwilling to consider the child's feelings and emotions and she is preoccupied with blaming the father, the counselor, and at times the child.

22. The mother refuses to admit that any of her behaviors have contributed to the status of her relationship with the child.

23. Cyd McGee, family counselor, is an Intensive Family Preservation specialist. She was authorized by the Court to provide therapeutic services to [Mother] and minor child in an attempt to reunify and begin visitation. Ms. McGee met with [Mother] and the minor child for three sessions in the Fall of 2014.

24. Ms. McGee testified and opined and the Court finds persuasive that [Blake] is a child who has been traumatized and did not want to participate in the family sessions.

25. Ms. McGee testified and opined and the Court finds persuasive that [Blake] felt he had been mistreated by his mother. Specifically, [Blake] recalled the following events that led to his beliefs of being mistreated:

a. His mother had thrown a water bottle at him;

b. During visits with his mother, [Mother] would talk in a negative light about his father . . . in front of the minor child; and

c. During visits with his mother, [Mother's] daughter would make negative comments about [Blake's] father.

26. Ms. McGee testified and opined and the Court finds persuasive that the mother during these counseling sessions was unable to emotionally acknowledge her son's feelings and at times would become defensive. The mother was disconnected from the child's feelings, and she did not respond emotionally, physically, or on any level when the child was expressing his feelings.

27. Ms. McGee testified that throughout the counseling sessions between the mother and the child she observed the child trembling, shaking, developing headaches, and crying. Ms. McGee further testified that it was not in the child's best interest to continue with this reunification process as it was re-traumatizing the child.

28. Ms. McGee testified and opined and the Court finds persuasive that [Blake] is a typical 13 year old teenager who is well-spoken and has stated that he does not want to do this, that he feels forced to continue with the reunification process and that the mother is unable to provide for [Blake's] emotional needs.

29. Ms. McGee concluded that any further counseling sessions would re-traumatize the child.

30. Charlotte Roberts testified as [Mother's] counselor that the mother has been consistent with her therapy, the purpose of which was to improve communication with her son. However, [Mother] did not meet with Ms. Roberts during the months of September and October, 2014, which was during the time the family counseling sessions were taking place.

31. Ms. Roberts testified that at no time has the mother divulged or shared information regarding how the family sessions were going. This is concerning to the Court in light of the testimony of Ms. McGee that the reunification process was failing.

32. According to Mr. Feasel, the reunification process with Ms. McGee in the Fall of 2014 caused [Blake] further intense psychological stress.

> 33. Mr. Feasel testified that [Blake's] reactions and fears were sincerely held, and not easily overcome.
>
> 34. Mr. Feasel testified that he would refuse to be part of any further reunification counseling sessions between [Mother] and minor child because of the harm he feared it would cause the minor child. The effects of the joint sessions as described by Ms. McGee support Mr. Feasel's conclusions. Mr. Feasel has been counseling [Blake] for several years, and the Court finds his opinion as to reunification to be well-grounded.
>
> 35. Since the January 30, 2013, Order the parties have made two failed attempts of reunification. The child's negative emotional, physical and psychological reactions to his mother since the entry of that Order have been fully vetted and explored by his counselor and are well-grounded. He is a happy and healthy 13-year-old child who is thriving in his life, but for the mother-child relationship.
>
> 36. [Mother] is responsible for the fractured relationship between herself and the minor child due to her actions with and around the minor child.
>
> 37. There is no evidence before the court that limited telephone contact with his mother or her attendance at his activities have been harmful to the minor child; and therefore the Court finds it is in the child's best interest to have limited telephone contact and to permit the mother's attendance at extracurricular activities as set forth below.

The trial court concluded:

> 2. There has been a substantial change of circumstances affecting the welfare of the minor child since the entry of the January 30, 2013 Order which have affected the best interest and general welfare of the minor child, and it is now in the best interests of the minor child to modify visitation.

The court then ordered the same limited visitation as had been in place since 10 October 2013 -- two telephone calls and one extracurricular activity per week -- but added a requirement that Father, within 30 days of the entry of the order, must select a licensed psychologist or counselor to counsel with Blake, Mother, and as appropriate, both of them, "to explore the issue of resuming visitation between Mother and child,

even on a limited basis." Father timely appealed the 31 May 2016 order to this Court.

Discussion

Father's sole argument on appeal is that the trial court erred by concluding that a change in circumstances had occurred justifying a modification of custody and then modifying the order in a way that was not supported by the trial court's findings of fact. Specifically, Father argues:

> [T]he trial court erred by ordering [Father] to select a licensed counselor to counsel with the minor child, the mother, and as deemed appropriate, with the mother and the child, to explore the issue of resuming visitation between mother and child because the trial court failed to base its conclusions of law upon sufficient findings of fact.

Under N.C. Gen. Stat. § 50-13.7(a) (2015), an order for child custody "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested[.]" The North Carolina Supreme Court has explained in detail how appellate courts review modification of custody orders:

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows a substantial change of circumstances affecting the welfare of the child warrants a change in custody. . . .
>
> As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests.
>
> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect

> the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.
>
> When reviewing a trial court's decision to grant or deny the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> . . . .
>
> In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

*Shipman v. Shipman*, 357 N.C. 471, 473-75, 586 S.E.2d 250, 253-54 (2003) (citations and quotation marks omitted).

Father does not dispute any of the trial court's findings of fact in this case, but rather argues that the findings fail to support the conclusions of law. "Because plaintiff has not challenged any of the trial court's findings of fact, they are binding on appeal, and we must consider only whether

the findings of fact supported the conclusions of law." *Pass v. Beck*, 210 N.C. App. 192, 197, 708 S.E.2d 87, 91 (2011) (citations omitted).

We will first note that one of the challenging parts of this case is simply determining which order is the "prior order" which is being modified, since the court is required to find a substantial change of circumstances from that particular date and order until the time of the new order. Since so many motions were filed and so many orders and "supplemental orders" were entered, it is difficult to trace back to the starting point. Both parties filed motions for modification of custody in April 2013. The 10 October 2013 order contained extensive findings of fact, including the required findings of fact and conclusions of law to support modification of the custodial schedule. We also recognize that this Court's prior opinion held that the 10 October 2013 order was the last permanent order subject to modification:

> On remand, the trial court should enter findings based on the preponderance of the evidence and conclusions of law supported by its findings. If the trial court modifies the custody order of 10 October 2013 or its associated supplemental order of 19 November 2013, its findings must support an ultimate finding that there has been a substantial change of circumstances that affects the welfare of the child.

*Williams*, __ N.C. App. __, 782 S.E.2d 122, 2016 WL 409901 at *6, 2016 N.C. App. LEXIS 124 at *15.

Our record does not include any motion for modification of custody filed after the 10 October 2013 order, but it appears that this chain of orders relates back to the April 2013 motions.[3] In February 2015, Mother did file a request for "review" of the prior orders regarding addressing restoration of her relationship with the child, and this could generously be construed as a motion for modification of custody. In any event, both this panel and the trial court are bound by this Court's prior opinion, so we will address the modification order on appeal based upon the October and November 2013 orders. *See*, *e.g.*, *Lueallen v. Lueallen*, __ N.C. App. __, __, 790 S.E.2d 690, 696 (2016) (concluding order that was arguably temporary could nevertheless be addressed where "another panel of this Court ha[d] previously ordered the relevant provisions of the . . . order

3. We also note that neither party was represented by counsel in either this appeal or the last. Only Father filed a brief in this appeal. We are not entirely confident that either the current record on appeal or the record for the last appeal is complete, but as best we can tell based upon the arguments of Father, it is sufficient to address the issue raised in this appeal.

stayed" and holding that since this Court is "bound by that ruling, we will address Mother's appeal. In addition if we were to dismiss Mother's appeal, it would only add to the delay in establishing a final custodial schedule, much to [the minor child's] detriment." (Citation omitted)).

We agree with Father that the trial court's conclusions of law -- and in particular the modification which requires even more counseling and reunification efforts -- are not supported by the court's findings of fact or conclusions of law. We are perplexed by how the trial court ultimately reached the end result of requiring *additional* counseling after finding that prior efforts had failed and additional reunification counseling would "re-traumatize" him. The court's findings, which are not challenged on appeal, uniformly show that Mother has not made improvements in years of prior counseling attempts and that Mother and Blake's relationship has deteriorated even further due to Mother's attitude, behavior, and general unwillingness to accept responsibility for the state of her relationship with her son. Most relevant to the requirement of additional counseling, the trial court found that "any further counseling sessions would re-traumatize the child"; that "the reunification process with Ms. McGee in the Fall of 2014 caused [Blake] further intense psychological stress"; that "the minor child has experienced fear, anxiety, shaking, an inability to sleep, nausea and anger regarding reunification with his mother"; and that "Ms. McGee testified and opined and the Court finds persuasive that [Blake] is a child who has been traumatized and did not want to participate in the family sessions." Despite these findings that the reunification attempts had traumatized the child and that further counseling would re-traumatize him, the trial court ordered *more* counseling aimed at reunification. The only changes in circumstances since the October 2013 and November 2013 orders which were found by the trial court were negative changes -- failed efforts at counseling, the child's increased anxiety, and mother's continued failure to improve her behavior. The trial court then concluded that circumstances had changed substantially to support modifying the custody order and that modification would be in the "best interests of the minor child[,]" but, inexplicably, the only substantive modification from the prior order was to add in a requirement that Father find a new counselor for the child and Mother so that the issue of revisiting Mother's visitation privileges with the child could be evaluated further. Specifically, the trial court ordered, in relevant part, that:

> 3. [Father] shall, within 30 days of the entry of this Order, select a licensed Counselor/Psychologist to counsel with the minor child, with the Mother, and, as deemed

> appropriate, with Mother and minor child, to explore the issue of resuming visitation between Mother and child, even on a limited basis.
>
> 4. Any joint sessions, or other direct contact between Mother and minor child, shall be as directed by the licensed Counselor/Psychologist, as he/she determines such contact to be not detrimental to the mental and emotional well-being of the minor child.
>
> 5. Any failure of the Plaintiff/Mother to cooperate with, or promptly pay for the services of, the licensed Counselor/Psychologist, will be taken into consideration by the Court in future proceedings, and could subject her to the contempt powers of the Court.
>
> 6. [Father] shall take the steps reasonably necessary to choose the counselor, provide the contact information to [Mother's] Attorney, and to ensure the minor child's attendance and participation in scheduled sessions. Any failure of the Defendant/Father to comply with these directives will be taken into consideration by the Court in future proceedings, and could subject him to the contempt powers of the Court.

These requirements seem to conflict with everything else in the court's order up to this point.

The trial court may have misinterpreted this Court's prior opinion as directing the court to conclude that a substantial change had occurred supporting modification *in Mother's favor*, but that is not what our prior opinion stated. Our previous opinion simply held:

> In sum, the trial court's custody order must be vacated because (1) the trial court failed to make conclusions of law; (2) the order modified custody without first finding that there had been a substantial change of circumstances, and (3) the order denied [Mother] any visitation with the child without the findings required to support such an order. . . .
>
> . . . . On remand, the trial court should enter findings based on the preponderance of the evidence and conclusions of law supported by its findings. If the trial court modifies the custody order of 10 October 2013 or its associated supplemental order of 19 November 2013,

> its findings must support an ultimate finding that there has been a substantial change of circumstances that affects the welfare of the child. If the trial court denies [Mother] reasonable visitation its evidentiary findings should support an ultimate finding that [Mother] is either unfit to visit with the child or that visitation with [Mother] is not in the child's best interest.

*Williams*, __ N.C. App. __, 782 S.E.2d 122, 2016 WL 409901, at *6, 2016 N.C. App. LEXIS 124, at *14-15. In other words, the trial court was free to make additional findings of fact and depending upon those facts, to do any of the following on remand: (1) conclude that there had been no substantial change of circumstances which would justify modifying Mother's limited contact as set forth in the October 2013 order in *any* way, either by increasing it or decreasing it; (2) conclude that there had been a substantial change of circumstances which justifies modification of custody, but enter an order decreasing Mother's contact with the child, if this would be in the child's best interest; or (3) modify custody in some other way, depending upon the new findings of fact and upon conclusions of law to support modification and demonstrating that the particular modification ordered would be in the child's best interest.

Instead, on remand, the trial court made the findings of fact as discussed above and the following conclusion of law:

> 2. There has been a substantial change of circumstances affecting the welfare of the minor child since the entry of the January 30, 2013 Order which have affected the best interest and general welfare of the minor child, and it is now in the best interests of the minor child to modify visitation.

Based upon the trial court's findings, we are unable to discern any changes of circumstances since the October and November 2013 orders which would justify increasing Mother's contact with Blake in any way. The findings of fact also do not show how another attempt at counseling and reunification could possibly be in the child's best interest. Based upon the trial court's finding that there was no showing that the telephone contact and once-weekly attendance of an extracurricular event had been harmful to the child, it would seem logical that the trial court would have simply concluded that there was no reason to modify the prior order.

Since the findings of fact are not challenged on appeal and since only one conclusion of law can logically follow from these findings, we

vacate only the trial court's conclusion of law and decretal provisions noted above of the 31 May 2016 order. The findings of fact are affirmed. On remand, the trial court shall enter an order with the same findings of fact as in the order on appeal and a conclusion of law that there has been no showing of a substantial change in circumstances which would justify modification of Mother's limited visitation as set forth in the 10 October 2013 order, nor would any modification be in Blake's best interests. *See*, *e.g.*, *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) ("The welfare of the child has always been the polar star which guides the courts in awarding custody."). There is no factual or legal basis to order more reunification counseling.

Conclusion

Accordingly, we hold that the trial court's second conclusion of law is not supported by its findings and that the requirement of additional counseling in particular is not supported by either the findings of fact or the conclusion of law. We therefore vacate *only* the second conclusion of law and decretal provisions 3, 4, 5, and 6 of the order on appeal. The findings of fact in the 31 May 2016 order were not challenged on appeal and we affirm these findings. We remand this matter for entry of an order which incorporates these same findings of fact and denies modification of the 10 October 2013 order, as described above.

The 2013 order was entered a long time ago, and much has happened and many orders have been entered since 2013. To assist the parties in understanding which order provisions the parties need to follow after this remand, the trial court's new order on remand should also simply note that Mother already completed the psychological evaluation as ordered in the 10 October 2013 order; and that the supplemental provisions of the 19 November 2013 order regarding the Child and Family Treatment Team and counseling have also been completed. Since there has been no substantial change of circumstances justifying modification of the October 2013 order, Mother's visitation upon remand shall be exactly the same as set forth in the 10 October 2013 order in decretal provision 1, subsections (a) and (b); these are the very same provisions as set forth in decretal sections 1 and 2 of the order on appeal, and we have not vacated these two decretal provisions since they are unchanged from the 10 October 2013 order.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JULY 2017)

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| BAKER v. N.C. PSYCHOLOGY BD.<br>No. 16-1175 | Durham<br>(16CVS3036) | Reversed in Part and Remanded |
| BENEDITH v. WAKE FOREST BAPTIST MED. CTR.<br>No. 17-284 | Forsyth<br>(16CVS6864) | Affirmed |
| COLUMBUS CTY. DEP'T OF SOC. SERVS. v. NORTON<br>No. 16-735 | Columbus<br>(10CVD152) | Dismissed |
| HOGUE v. BROWN & PATTEN, PA<br>No. 17-103 | Haywood<br>(15CVS905) | Affirmed |
| HUTCHISON v. N.C. DEP'T OF JUSTICE<br>No. 16-1082 | Office of Admin. Hearings<br>(16OSP6725) | Affirmed |
| IN RE A.C.W.<br>No. 16-1289 | Randolph<br>(16JA45) | Reversed and Remanded |
| IN RE A.H.<br>No. 17-118 | Iredell<br>(15JT184-185) | Affirmed |
| IN RE A.P.R.<br>No. 17-111 | Guilford<br>(15JT27) | Affirmed |
| IN RE A.U.<br>No. 16-1284 | Franklin<br>(15JT1) | Affirmed |
| IN RE H.S.<br>No. 16-1241 | Bladen<br>(15JA06) | Affirmed |
| IN RE I.N.S.<br>No. 17-31 | Montgomery<br>(14JT11)<br>(14JT12)<br>(14JT42) | Affirmed |
| IN RE J.D.H.<br>No. 16-1286 | Gaston<br>(14JT105-107) | Affirmed |
| IN RE J.Y.<br>No. 17-42 | Orange<br>(13JT5)<br>(15JT3) | Affirmed |
| IN RE MEETZE<br>No. 16-796 | Wilson<br>(16E65) | Affirmed |

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| IN RE S.W.<br>No. 16-1235 | Forsyth<br>(16J45) | Affirmed |
| IN RE T.Z.J.<br>No. 17-73 | Wake<br>(16JB490) | Vacated |
| MASSENGILL v. BAILEY<br>No. 16-1084 | Johnston<br>(13CVS923) | No Error |
| NEW v. NEW<br>No. 16-1167 | Cabarrus<br>(15CVD3132) | Reversed and Remanded |
| STATE v. ALSTON<br>No. 16-1185 | Orange<br>(12CRS52087)<br>(12CRS53311)<br>(13CRS50096)<br>(15CRS267) | Affirmed and Remanded for Correction of Clerical Error |
| STATE v. BAILEY<br>No. 16-1192 | Beaufort<br>(14CRS50275)<br>(14CRS50278) | No Error |
| STATE v. BAILEY<br>No. 16-962 | Orange<br>(15CRS50387) | No Error |
| STATE v. BLEVINS<br>No. 16-589 | Cleveland<br>(13CRS55701) | Affirmed |
| STATE v. BOLDER<br>No. 16-814 | Cabarrus<br>(14CRS52082) | No Error |
| STATE v. CARTER<br>No. 16-946 | Clay<br>(15CRS21)<br>(15CRS7) | Vacated in part, reversed in part and remanded for resentencing. |
| STATE v. ELLIS<br>No. 16-1220 | Forsyth<br>(14CRS59279)<br>(14CRS59281-82)<br>(14CRS59284) | No Error |
| STATE v. GRICE<br>No. 16-1274 | Pender<br>(15CRS1109)<br>(15CRS1379)<br>(16CRS155) | Affirmed |
| STATE v. HOOKER<br>No. 16-1308 | Alamance<br>(13CRS57353-55)<br>(13CRS57713) | Affirmed |
| STATE v. MOODY<br>No. 17-11 | Wake<br>(15CRS219845) | Dismissed |

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| STATE v. NORMAN<br>No. 16-1232 | Mecklenburg<br>(14CRS234650) | No Error |
| STATE v. SANCHEZ<br>No. 17-98 | Brunswick<br>(12CRS51740) | Affirmed and Remanded for Correction of Clerical Error |
| THOMAS & CRADDOCK SALES, INC. v. GIFT BAG LADY, INC.<br>No. 16-936 | Mecklenburg<br>(15CVS12638) | Affirmed |
| ZOLP v. CORDELL<br>No. 16-895 | Buncombe<br>(16CVS548) | Dismissed |

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